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No. 04-18

In The Supreme Court of the United States

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE CALIFORNIA PUBLIC UTILITIES COMMISSION,

Petitioners,

v.

UNITED STATES TELECOM ASSOCIATION, *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Communications Commission's ("FCC") *Triennial Review Order ("TRO")*[1] was designed to implement those sections (specifically, §251 and §252) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996[2] ("1996 Act") that were intended to enhance competition in the telecommunications industry. California seeks reversal of those findings in the *TRO*, which improperly and illegally emasculate these competition-enhancing provisions of the 1996 Act. Moreover, to the extent that the opinion of the District of Columbia Circuit below in *United States Telecom Association v. FCC*, 359 F.3d 554 (DC Cir. 2004) (*"USTA II"*) upheld the FCC's illegal findings in this regard, California seeks reversal of that decision. Specifically, California challenges those findings in the *TRO* that:

(1) ignored the plain terms of the provisions of the 1996 Act (*i.e.*, §§251-252) and were unlawful, arbitrary and capricious in that the FCC failed to unbundle the broadband transmission capabilities of hybrid-fiber loops[3] and line-sharing over copper

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[1] *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338 *et al.*, FCC 03-36.

[2] Pub. L. 104-104, 110 Stat.56.

[3] Hybrid-fiber loops provide access to the Internet through the use of loops made of fiber at the central office end, and of copper at the customer end.

QUESTIONS PRESENTED – Continued

loops,[4] using Digital Subscriber Lines ("DSL") which is a major telecommunications pipeline allowing business and residential customers to access the Internet, thereby preventing the full-blown and rigorous competition envisioned by the 1996 Act; these loops are owned by the Regional Bell Operating Companies ("RBOCs") and independent Incumbent Local Exchange Carriers ("ILECs"); however, the RBOCs, in particular, because of their large size, are likely to be able to exercise an unexceptable degree of monopoly power as a result of the FCC decision.

(2) unlawfully usurped the critical role Congress assigned to the States in the 1996 Act to protect competitors and consumers in connection with hybrid-fiber and line-sharing with regard to the negotiation, arbitration, pricing, and approval of the terms of interconnection agreements between the RBOCs and independent ILECs on the one hand, and their actual and prospective competitors (*i.e.*, the CLECs) on the other; and

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[4] Copper loops are used primarily for voice transmission; however, portions of these copper loops are available for data transmission. When this occurs, it provides an opportunity for "line-sharing." "Line-sharing" is the practice by which a competitive local exchange carrier ("CLEC") and a RBOC and independent ILEC share a local loop, that is, a copper loop which connects the customer to the RBOC's and independent ILEC's switch which serves the customer. A DSL provider will negotiate a deal with the RBOC or the independent ILEC to provide DSL service for Internet access over the same copper loop that the RBOC and independent ILEC are using to provide voice telephone services.

QUESTIONS PRESENTED – Continued

(3) purported to preempt additional State unbundling requirements instituted to protect competitors and consumers regarding hybrid-fiber and line-sharing; on its face, the FCC's attempt to preempt state authority is both inconsistent with the 1996 Act's express reservation of State authority and prevents implementation of the Act's requirements and purposes.

California also challenges that portion of the District of Columbia Circuit's *USTA II* opinion below, which illegally purported to invalidate the FCC's earlier decision to delegate to the States the job of making various network unbundling determinations. Contrary to the view of the court below, the FCC's delegation of these functions to the States was both reasonable and in the public interest.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The Petitioners in this Court are:

The People of the State of California

The Public Utilities Commission of the State of California

The parties to the proceedings in the District of Columbia Circuit below are listed on the caption of the decision below. *See* Appendix D.

The Public Utilities Commission of the State of California ("CPUC") is a State regulatory commission charged by its State statutes with oversight of telecommunications common carriers operating in California. As a State entity, the People of the State of California and the Public Utilities Commission of the State of California ("California") are not required to file a statement under Supreme Court Rule 29.6.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 29.6 STATEMENT	iv
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	viii
PETITION FOR WRIT OF CERTIORARI	1
INTRODUCTION	1
OPINIONS BELOW	6
JURISDICTION	7
CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED	7
BACKGROUND	7
A. History and Purpose of the 1996 Act	7
B. The Local Competition Provisions of the 1996 Act	9
C. Status of the Case	11
REASONS FOR GRANTING THE WRIT	12
A. The FCC's Failure to Unbundle the Broadband Transmission Capabilities of Hybrid-Fiber Loops and Line-sharing was Violative of the Express Terms of the Telecommunications Act of 1996 and the FCC's Justification of its Actions are Arbitrary and Capricious	13
1. The state of existing competition does not justify the FCC's findings	14

TABLE OF CONTENTS – Continued

Page

2. The FCC illegally justifies denying open access to broadband pipelines for hybrid-fiber loops and line-sharing, and the resulting loss of competition, by misplaced reliance on only one aspect of the uncodified statements in §706 17

B. The *TRO* Impermissibly Purports to Preempt State Authority to Set Line-Sharing Rates..... 20

C. Contrary to the 1996 Act, the *TRO* Impermissibly Purports to Preempt State Authority to Require Line-Sharing as a UNE 23

1. The statutory language precludes FCC preemption of State unbundling regulations that are not inconsistent with, and that do not substantially prevent implementation of §251's requirements 23

2. The FCC has erroneously written State commissions' preserved authority out of the Act 24

3. The FCC impermissibly requires State action to be consistent with its own impairment results 26

4. The FCC's claim that §261 constrains State unbundling actions is unjustified ... 27

5. There is no credible argument that California's claims in this case are not ripe for review 28

TABLE OF CONTENTS – Continued

Page

D. The Court of Appeal Unlawfully Restricted the Role of State Commissions by Invalidating the FCC's Earlier Decision to Delegate to the States the Job of Making Unbundling Determinations Regarding the Network Elements of Switching and Dedicated Transport 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999) ..... *passim*

AT&T Corp. v. Iowa Utilities Board, 219 F.3d 744 (8th Cir. 2000) 22

City of New York v. FCC, 486 U.S. 57 (1988) 25

Competitive Telecommunications Association v. FCC, 309 F.3d 8 (DC Cir. 2002) 17

Fidelity Federal Savings & Loan Association v. De La Cuesta, 458 U.S. 141 (1982) 25

Geier v. American Honda Motor Co., 529 U.S. 861 (2000) 25

Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997) 26, 27, 28

Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986) 24

United States v. American Telephone & Telegraph Corp., 552 F.Supp.131 (DC 1982), affd. *sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).. 7, 8, 11

United States Telecom Association v. FCC, 290 F.3d 415 (DC Cir. 2002) 5, 11, 24, 29

United States Telecom Association v. FCC, 359 F.3d 554 (DC Cir. 2004) ..... *passim*

Verizon Communications v. FCC, 535 U.S. 467 (2002) 8, 22

TABLE OF AUTHORITIES – Continued

Page

STATUTES/CONSTITUTIONAL PROVISIONS

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ..... *passim*

28 U.S.C. §1254(1) 7

28 U.S.C. §2342(i) 7

47 U.S.C. §152(b) 20

47 U.S.C. §157 (§706, *codified in* notes to this section.) ..... *passim*

47 U.S.C. §160 7

47 U.S.C. §201 ..... 21, 22, 29

47 U.S.C. §202 ..... 21, 22

47 U.S.C. §251 ..... *passim*

47 U.S.C. §251(c)(2) 9

47 U.S.C. §251(c)(3) 3, 9, 22, 28, 29

47 U.S.C. §251(d) 19, 24

47 U.S.C. §251(d)(1) 29

47 U.S.C. §251(d)(2) ..... *passim*

47 U.S.C. §251(d)(3) ..... *passim*

47 U.S.C. §252 ..... 7, 8, 10, 12, 23

47 U.S.C. §252(a)(1) 20, 27

47 U.S.C. §252(c)(1) 25

47 U.S.C. §252(c)(2) 21

47 U.S.C. §252(d)(1) 9, 21

47 U.S.C. §252(d)(2) 29

47 U.S.C. §252(e)(3) 22

TABLE OF AUTHORITIES – Continued

Page

47 U.S.C. §252(e)(6) 20, 23

47 U.S.C. §261 ..... 7, 27, 28

47 U.S.C. §261(b) 27

47 U.S.C. §261(c) 27

47 U.S.C. §271 ..... 7, 20, 21, 22

47 U.S.C. §271(c)(2) 27

47 U.S.C. §402(a) 7

ADMINISTRATIVE DECISIONS/REGULATIONS

FEDERAL COMMUNICATIONS COMMISSION

Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338 *et al.*, FCC 03-36 (2003) ..... *passim*

In re Inquiry Concerning the Deployment of Advanced Telecommunications Capacity to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 15 F.C.C.R. 20913 (2000) 4

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (1996) 26

CALIFORNIA PUBLIC UTILITIES COMMISSION

California Public Utilities Commission Decision (D) 03-01-077 16

TABLE OF AUTHORITIES – Continued

Page

CONGRESSIONAL MATERIAL

S. Rep. 104-23.104th Cong., 1st Sess. 43 (1995)..... 22

PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This is a case of critical national importance. This honorable Supreme Court must reverse those portions of the FCC's *TRO* and of the District of Columbia ("DC") Circuit's decision below to ensure that the United States' information economy continues to be the most vibrant, innovative and productive in the world. Without reversal, the telecommunications landscape will be handicapped by a marketplace that encourages the creation of unregulated monopolies at worst, and duopolies at best, at the expense of genuine competition, the hallmark of true innovation and choice for both large and small business and residential consumers, both nationwide, as well as in California, one of the technologically most innovative states in the country. Such a result could cause irreparable harm to the economy of the United States in general and of California in particular.

DSL service is the pipeline[5] that allows for access to the Internet through the High Frequency Portion of the Loop ("HFPL"). Today, DSL service is, and is commonly thought of as, one of the major economic engines fueling the information age economy. Easy access to, and the economical availability of, this network is an essential component, for both small and large businesses throughout the United States to compete in the global economy.

Sections 251-252 of the 1996 Act require open access to this service at cost-based rates as long as there is impairment to competition.[6] While the FCC found, in the

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[5] These pipelines are owned and operated by the four remaining RBOCs, namely, Verizon, SBC, BellSouth and QWEST, and by other smaller independent ILECs.

[6] As approved by this Court in *AT&T v. Iowa Utilities Board*, 525 U.S. 359, 366 (1999), these cost-based rates are to be set by the States using the TELRIC methodology. "TELRIC" stands for Total Element

(Continued on following page)

TRO, that such competitive impairment existed (for reasons that can only be described as spurious, in that they lacked any substantive "record evidence", as well as ultimately dangerous to the economic future of the United States), the FCC nonetheless denied the RBOCs' and independent ILECs' competitors (*i.e.*, the CLECs) open access to the DSL pipelines to the Internet that connect homes and businesses to the central offices of existing telephone companies.

Until now, the CLECs have been able to use RBOCs' and independent ILECs' DSL pipelines to offer consumers a competitive choice to access the Internet through the use of unbundled network elements ("UNEs"). For DSL service, the UNEs have largely consisted of access to existing copper loops (*i.e.*, line-sharing); however, comparable UNEs can be established for a newer technology that is increasingly being used in new business and residential developments, namely, hybrid-fiber loops that contain both fiber-optic and copper elements.[7]

The record before the FCC showed that, nationally, more than 30% of RBOC and independent ILEC lines use mixed fiber and copper facilities (*i.e.*, hybrid-fiber), and that by the end of 2004, 50% are expected to use hybrid-fiber loops. *See*, Stumbaugh/Reilly Declaration, at 16 in the record below. These numbers are likely to be higher in California, where SBC deployed hybrid-fiber ahead of similar projects by other RBOCs and ILECs around the country.

Long Run Incremental Cost, which is the costing methodology approved by the FCC for the States to use in setting prices for unbundled network elements.

[7] The most common form of hybrid-fiber loops are those that use fiber in the "feeder" portion of the circuit, which connects the central office to a remote terminal, and copper in the "distribution" portion of the circuit that connects the remote terminal to a customer's premises.

The importance of hybrid-fiber to the economic competitiveness of American business and residential consumers is underscored by the increasing availability of symmetrical DSL service (which provides broadband service in both directions; this is necessary for sending graphics, video, detailed spreadsheets, etc.). While this technology enhances the use of broadband services, it also increases network efficiency for the provision of voice services and is part of the move towards offering video services over telephone lines.

Contrary to the unambiguous language of the 1996 Act, the FCC's *TRO*, upheld by the court below, completely denies open access to hybrid-fiber and allows for a three-year transition period, at the end of the first year competitive access through line-sharing will cease to be available at cost-based rates. However, this limited continued existence that the FCC would allow for line-sharing is economically infeasible and will surely end any viable competition to the RBOCs and independent ILECs in the provision of DSL/broadband service after the first year. *See*, *TRO* ¶264. Without any economically feasible access for CLECs to hybrid-fiber, no competitive DSL offering will be available to many Californians.[8] On its face, this is inconsistent with the local access obligations for DSL service established under §251(c)(3) of the 1996 Act.

The two FCC Commissioners who dissented from this portion of the *TRO* articulated their concerns about competition in broadband and regarding "line-sharing", in particular. Especially noteworthy are the comments of FCC Chairman Powell, who stated in his dissent from the majority decision to eliminate line-sharing as a UNE, at 1-2:

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[8] Phoenix Center Policy Paper Number 18, *Market Power and the Consequences of Premature Deregulation in Telecommunications Markets* (July 2003).

> "To date, line-sharing has generated clear and measurable benefits for consumers. It has unquestionably giving birth to important broadband suppliers. This additional facility-based competition has directly contributed to lower prices for new broadband services."

Even the *USTA II* Court admitted that there was "impairment" with respect to the elimination of both hybrid-fiber and mandatory line-sharing. *See USTA II*, 359 F.3d at 585. The importance of the remarks on this issue by the FCC's dissenting Commissioners, as well as by the *USTA II* Court, is underscored by the fact that before the FCC's line-sharing rules allowed new entrants to deploy competitive broadband technology, there was *no competition* to provide access to the Internet through DSL service; rather, the RBOCs and independent ILECs had an effective monopoly in providing the service. Moreover, since line-sharing has been in place, there has been an explosive growth in the use of such service. In this regard, the FCC's own studies indicate that for every line-sharing DSL line, RBOCs and independent ILECs responded by deploying four retail DSL lines. *See, Communications Daily*, October 20, 2003.

Historically, the FCC had found in prior orders[9] that line-sharing was a local access obligation. As such, it was designated as a UNE. This allowed the RBOCs' and other independent ILECs' actual and potential competitors to lease the RBOCs' and ILECs' loops in order to provide independent DSL service to their own customers at cost-based rates.[10]

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[9] *See*, FCC Order *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capacity to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 15 F.C.C.R. 20913 (2000)* ("*Line-Sharing Order*").

[10] In contrast, hybrid-fiber is a newer technology and has not been designated as a UNE at this time.

In 2002, in *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (2002) ("*USTA I*"), the court directed the FCC to investigate whether the elimination of hybrid-fiber as a potential UNE and line-sharing as an existing UNE would impair competition. *Id.*, at 425. Subsequently, in the *TRO*, as upheld by the court below, the FCC found that competitive DSL services are "impaired" in their ability to compete with RBOCs and independent ILECs without the ability to lease hybrid-fiber loops or copper loops as UNEs. *TRO* ¶286. This section found "[c]ompetitive LECs are impaired on a national basis without unbundled access to the transmission path when seeking a path to a mass market." Ordinarily, without any countervailing considerations, such a finding would *require* the RBOCs and independent ILECs to make hybrid-fiber loops and line-sharing available as UNEs under §251(d)(2) of the 1996 Act.

Instead, in the *TRO*, the FCC, upheld by the court below, articulated two primary excuses for why the FCC could totally ignore the law. First, the FCC claims, without sound evidentiary support, that technologies other than DSL are available for customers to use to access the Internet. Second, the FCC attempted to justify its flaunting of the competitive provisions of the 1996 Act by misreading and mischaracterizing an uncodified section of the 1996 Act, specifically, §706. This section does not contain any specific mandates or standards that can be weighed against those that are set forth in §251(d)(2). Rather, §706(a) makes the general policy pronouncement that the FCC and State commissions should encourage "the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" through "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."

However, nothing in this generic language of §706(a) can be read to elevate "infrastructure investment" above

other means of achieving the Act's goals, but, rather, shows that Congress considered promoting competition to be of *equal importance* in achieving those goals. There is no reasonable interpretation of §706 that can indicate any intent to trump the specific standard set forth in §251(d)(2), which is designed to allow unbundled access, via UNEs, when necessary to promote competition for advanced services such as DSL.

California is profoundly concerned that the serious violations of the competition provisions of the 1996 Act that are contained in the FCC's *TRO*, and affirmed on appeal, will have the effect of curtailing business and residential access to the Internet. Such a result will greatly harm the business climate – both in California and throughout the nation – particularly for the small businesses that make up one-half of the private sector economy of the United States.[11] For these reasons, California has deemed it necessary to file this Petition for Writ of Certiorari.

OPINIONS BELOW

The decision of the DC Circuit in *USTA II* is reported at 359 F.3d 554 (2004), and is reprinted in Appendix A at pages 1a-56a. The *TRO*, formally known as *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, is reported at 18 F.C.C.R. 19020 (2003). Relevant portions of the *TRO* are reprinted in Appendix B at pages 57a-105a.

[11] Source: United States Small Business Administration, 2003 United States Small Business Profile.

JURISDICTION

The Court of Appeal had jurisdiction pursuant to 28 U.S.C. §2342(i) and 47 U.S.C. §402(a). The DC Circuit issued its opinion and judgment on March 2, 2004. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This case involves §§160, 251, 252, 261 and 271 of the Telecommunications Act of 1996, 47 U.S.C. §§160, 251, 252, 261 and 271. Appendix C contains the text of these statutes.

BACKGROUND

A. History and Purpose of the 1996 Act

"A statute's history and purpose can illuminate its language." *See*, Justice Breyer's dissent in *AT&T Corp. v. Iowa Utilities Bd.*, *supra*. Congress enacted the 1996 Act to open local telecommunications markets, to full competition including traditional local telephone service, and newer services such as access to the Internet. The 1996 Act traded opening up of the telecommunications markets using the network of the RBOCs and independent ILECs for allowing the RBOCs to enter the long distance market and to be subject to less regulation of their activities.

In the middle part of the 20th Century, AT&T dominated the national telecommunications industry by controlling most local telephone service, long-distance telephone service and a substantial portion of all telephone equipment. In the late 1970's and early 1980's, the United States Attorney General's office ("AG") brought an antitrust suit against AT&T, *United States v. American Telephone & Telegraph Corp.*, 552 F.Supp.131, 165 (DC 1982), affd. *sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (commonly referred to as the *Modified Final Judgment* ("*MFJ*")). The

AG's antitrust suit reached its culmination when AT&T entered into an antitrust consent decree, which ended its industry dominance. *Id.*, at 160-170. *Also see*, generally, the discussion in the *MFJ* regarding AT&T's dominance in the nation's telecommunications industry.

The *MFJ* separated AT&T's long-distance business from its local telephone service subsidiaries and equipment manufacturers, and prohibited long distance providers from entering local telephone markets, and vice versa. Thus, while the decree promoted competition in long distance and equipment manufacturing, it barred new competition in the local telephone service markets. Local telephone service remained essentially a regulated monopoly, operated by the six (now four) RBOCs that were spun off from AT&T as part of the *MFJ*.

> "The decree [*MFJ*] did nothing however, to increase competition in the persistently monopolistic local markets, which were thought to be the root of the natural monopoly in the telecommunications industry." *Verizon Communications, Inc. v. Federal Communications Commission*, 535 U.S. 467, 475-476 (2002).

Congress' passage of the 1996 Act did not ignore concerns over the potential abuses made possible by the RBOCs' ownership of most of the telecommunications wires going into both business and residential premises. Therefore, in the 1996 Act, Congress created a legislative scheme that would set up a framework to open local telecommunications markets to full competition in exchange for the RBOCs' gaining entry into the long distance market and a reduction in regulatory scrutiny. Congress recognized that it was unlikely that a prospective competitor to an RBOC could entirely replicate the incumbent's existing local network infrastructure.

Accordingly, in the local competition provisions of the 1996 Act, 47 U.S.C. §§251-252, Congress provided the means for potential competitors to enter local markets by

using the incumbents' networks in a variety of ways. The 1996 Act imposed a large number of duties upon the RBOCs and independent ILECs in order to facilitate market entry by competitors, and established a complex régime for monitoring and enforcement. Central to the scheme of the 1996 Act is the RBOCs' and independent ILECs' obligation under 47 U.S.C. §251(c)(3) to share their networks with competitors, including provision of access to individual elements of the network on an "unbundled" basis. *AT&T v. Iowa Utilities Bd.*, *supra*. New entrants, the CLECs, lease these UNEs, either combined with each other or with elements belonging to the CLECs.

B. The Local Competition Provisions of the 1996 Act

The local competition provisions in §251(c)(3) of the 1996 Act entitle a new entrant to gain "access" to (*i.e.*, to lease) an incumbent's "network elements," such as loops, switching capability, and other components and capabilities of the incumbent's network at cost-based rates. That provision permits new entrants, some of which may also have network elements of their own, to lease from an incumbent those elements that they need to provide services to their own customers. The 1996 Act further permits new entrants to "interconnect" their own facilities with those in the incumbent's network "at any technically feasible point." *See*, 47 U.S.C. §251(c)(2).

In a world where the FCC was carrying out its responsibilities under the 1996 Act, a RBOC or independent ILEC must charge a new entrant cost-based rates for interconnection and access to network elements. If the incumbent and the new entrant could not agree on those charges, the 1996 Act authorizes the relevant State public utilities commission, acting as arbitrator, to set the rates that the incumbent may charge. 47 U.S.C. §252(d)(1).

The 1996 Act recognized that local regulators have experience in setting rates that recover added costs for

additional services imposed upon a RBOC's or independent ILEC's system and also a proper share of the fixed costs of local loops or switches. Thus, state regulators have had the job of setting wholesale rates using the TELRIC methodology approved by the FCC and this Court in *AT&T v. Iowa Utilities Bd.*, 525 U.S. at 385.

Notwithstanding this direction provided by the 1996 Act, throughout most of the United States, local telephone service has long been dominated, and remains dominated, by a single RBOC. The incumbent, whether an RBOC or an independent ILEC, owns and controls almost all loops (the wires that connect telephones to switches) in its service area, along with the switches (which direct calls to their destinations) and the transfer trunks (which carry calls between switches). The incumbents' control over these facilities in the past has solidified their *de facto* monopoly position in most local telecommunications markets. Indeed, even today, after years of efforts to open those markets to competition, incumbents still provide service to approximately 87% of all local telephone lines and control of 96% of the network. *See*, FCC Public Notice, entitled "Federal Communications Commission Releases Study on Telephone Trends," dated August 7, 2003.

In spite of the clear preservation of governmental authority set forth in §§251 and 252 of the 1996 Act, the FCC's *TRO* has effectively written these sections out of the 1996 Act without regard to circumstances within a state like California, and has, as a practical matter, effectively ended DSL competition in California. This means that there will be a loss of economic value for business (particularly small businesses) and residential consumers and a lack of investment in California in connection with Internet services that could be provided by CLECs using hybrid-fiber loops and line-sharing as the means for their customers to access the Internet via DSL. At the same time, the FCC's action will saddle consumers in many instances with a virtually unregulated monopolistic RBOC

or independent ILEC DSL provider, which has the economic incentive over the long term to force customers to buy in bundled packages and raise rates.

While it should be noted that the RBOCs agreed not to raise rates until after the November-December timeframe when the FCC determined not to pursue its appeal of the court's decision below, this moratorium does not include the pricing of hybrid-fiber loops or line-sharing. Indeed, the RBOCs have announced their intention to raise rates for access to these components of their system.[12]

The FCC and the court below appear to be more interested in following their own abstract policy objectives than in following the law that they are both legally responsible for implementing. The 1996 Act was put in place to *promote* competition, not to revisit a new version of the pre-*MFJ* telecommunications monopolies, but without the close regulatory oversight of those monopolies that has existed in the past.

C. Status of the Case

In *AT&T v. Iowa Utilities Board*, *supra*, this Court affirmed the use of the TELRIC methodology to set wholesale prices and vacated the FCC's initial list of UNEs. Subsequently, in *USTA I*, *supra*, the DC Circuit remanded the FCC's Order. The FCC issued the *TRO* in response to this remand.

The FCC had found in its *Line Sharing Order*, *supra*, that line-sharing was a local access obligation. In 2002, in *USTA I*, *supra*, the court directed the FCC to investigate whether the elimination of hybrid-fiber as a potential UNE and line-sharing as an existing UNE would impair competition. *Id.*, 290 F.3d, at 425.

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[12] *See, e.g.*, Verizon letter regarding the "Notice of Line-Sharing Rate Increases."

Subsequently, in the *TRO*, as upheld by the court below in *USTA II*, the FCC found that competitive broadband providers using DSL are "impaired" in their ability to compete with RBOCs and independent ILECs without the ability to lease hybrid-fiber loops or line-sharing via copper loops as UNEs. Ordinarily, without any countervailing considerations, such a finding would *require* the RBOCs and independent ILECs to make hybrid-fiber loops and line-sharing available as UNEs under Section 251(d)(2) of the 1996 Act. Nevertheless, the FCC found, for other legally spurious reasons, that hybrid-fiber and line-sharing were not subject to the open access provision of the 1996 Act.

REASONS FOR GRANTING THE WRIT

This Court should grant this Petition for Writ of Certiorari and reverse the FCC's *TRO* as well as related portions of the decision of the DC Circuit below insofar as the *TRO* by its misapplications of the clear language set forth in §§251 and 252 of the 1996 Act, has effectively written these sections out of the 1996 Act. The FCC has taken this unprecedented action without regard to circumstances within individual states like California, and has effectively ended DSL competition in California as well as in other states. The effect will be a loss of economic value for business (particularly small business) and residential consumers and a resulting lack of investment in California, and other states, in connection with Internet services that could be provided by CLECs using hybrid-fiber and line-sharing as the means for their customers to access the Internet via DSL.

At the same time, the FCC's action will saddle consumers in many instances with an essentially unregulated, monopolistic RBOC or independent ILEC DSL provider, which will have the economic incentive over the long term to force customers to buy services in bundled

packages and to raise rates significantly higher than they would otherwise be if there were vibrant and effective competition in the provision of DSL services. If the RBOCs and independent ILECs are allowed to force a customer to buy circuit-switched voice service just to get a DSL connection, they will be able to limit the availability and desirability of other emerging broadband services, such as Voice over Internet Protocol ("VoIP"). Ideally, a residential customer would need only a DSL line and VoIP service. However, if the customer must buy circuit-switched RBOC and independent ILEC voice service just to get DSL, that customer would have limited use for a second phone line using VoIP technology, thus undercutting the potential benefit of VoIP, namely, that it may be a more efficient and economical replacement to traditional circuit-switched voice service. There is no technological imperative that requires this bundling practice.

A. The FCC's Failure to Unbundle the Broadband Transmission Capabilities of Hybrid-Fiber Loops and Line-sharing was Violative of the Express Terms of the Telecommunications Act of 1996 and the FCC's Justification of its Actions are Arbitrary and Capricious.

In the *TRO*, as upheld by the court below, the FCC found that competitive DSL services are "impaired" in their ability to compete with RBOCs and independent ILECs without the ability to lease hybrid-fiber loops or line-sharing as UNEs. *TRO* ¶286; *USTA II*, *supra*, 359 F.3d at 585. Given such a finding, the FCC should have required the RBOCs and independent ILECs to make hybrid-fiber loops and line-sharing available as UNEs under §251(d)(2) of the 1996 Act.

However, this is not what occurred. Instead, the FCC found that it could not unbundle the data portion of the

local loop with regard to hybrid-fiber loops and line-sharing because of the existence of other types of competition, such as Cable Modem and wireless broadband and of the *possibility* that RBOCs and independent ILECs will not invest in systems that in fact already exist or are currently in the process of being built. Such a finding is contrary to the evidence and the law and is arbitrary and capricious.

1. The state of existing competition does not justify the FCC's findings.

In performing its impairment analysis for hybrid-fiber loops and line-sharing, the FCC made a blanket national finding that "cable modem service is the most widely used means by which the mass-market obtains broadband service." *TRO* ¶262. This analysis did not include any assessment of the state of competitive impairment in any particular market. To add to the confusion of the FCC's position on this issue, elsewhere in the TRO, the FCC acknowledges that "the existence of intermodal loops does not warrant a finding of no impairment" because cable companies *do not provide wholesale access to their facilities. TRO* ¶245. The FCC utterly fails to address the contradiction between these two positions.

The FCC gives as its prime example the existence of "some evidence" of the proliferation of Cable Modem. *TRO* ¶¶228-229.[13] However, the FCC's own reports have found that Cable Modem is not ubiquitously available in California or in other states.[14] In California, in particular, DSL has a substantial lead over cable modem for generalized

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[13] However, the FCC's reliance on this "evidence" contradicts the FCC's express refusal earlier in the *TRO* to treat such irrelevant statistics as dispositive of its impairment analysis. TRO ¶114.

[14] *See, High-Speed Services for Internet Access: Status as of December 31, 2002*, Industry Analysis and Technology Division of the Wireline Competition Bureau, Federal Communications Commission, at Table 7 (June 2003).

broadband access. Nowhere in its discussion of this issue does the FCC even attempt to categorize the types of consumers that use Cable Modem and the availability of Cable Modem in individual states, nor does the FCC address the concern that customers employ Cable Modem primarily for residential (*i.e.*, personal) rather than business use because of the limited coverage of Cable Modem technology in non-residential settings.

The *TRO* does not even discuss the fact that small businesses would be disproportionately affected by the loss of competition resulting from precluding hybrid-fiber or line-sharing as UNEs. Thus, if the portion of the *TRO* that eliminates UNE treatment for hybrid-fiber and line-sharing is allowed to stand, these vital consumers could be left with only one alternative to access the Internet, namely, DSL service offered exclusively by the RBOCs and the independent ILECs. Given that small business make up fully one-half of the United States' private sector economy, such an outcome would create a serious economic impediment to a significant portion of the national economy that relies on the Internet to sell its products and transact its business.

Furthermore, in relation to competition, unlike DSL service providers, the cable companies that do provide Cable Modem service have no local access obligations under the 1996 Act (*TRO* ¶¶222-223). While in the future, other technologies, such as Wireless Broadband, may prove to be widely available competitors to DSL, this is not the case today. Moreover, Wireless Broadband is inherently less secure than DSL, and simply cannot serve the needs of small businesses or anyone else, for that matter, with a significant need for private and secure connections to the Internet.

Additionally, the FCC's findings are directly contradicted by the California Public Utilities Commission's ("CPUC") finding that there is a lack of affordable, ubiquitously available broadband service options provided by alternative Cable Modem, satellite and wireless technologies in California. *See*, CPUC Decision D.03-01-077, mimeo at 14 (2003) (citing data provided by California's RBOCs and independent ILECs and the California's Cable Telecommunications Association).

The FCC noted that Cable Modem service is provided over nine million lines, which is approximately 57% of all high-speed lines. *TRO* ¶262, n.777. However, in California, according to the FCC's latest statistics on the more than 1.4 million California subscribers, DSL has a 26% lead over Cable Modem deployment. DSL is clearly the leading form of broadband access in California. Further, one-third of all Californians live in cities where DSL is the only choice for broadband service. *See*, fn 13, *supra*.

In addition, the FCC's decision relies on the availability of line-splitting as an alternative to line-sharing. *TRO* ¶259. Line-splitting occurs when a data CLEC has an agreement with a voice CLECs to purchase an entire loop, with the voice CLEC using the low-frequency portion of loop and the data CLEC providing DSL service using the high frequency portion of the loop. Of the nearly 180 million RBOC and independent ILEC access lines as of December 2002, approximately 10.2 million were being used by CLECs to provide local voice service. Thus, line-splitting is possible only on 5% of the total of RBOC and independent ILEC-controlled access lines.[15] In the last two years, that number has not changed so substantially to allow the RBOCs and independent ILECs to show that line-splitting is a significant substitute for line-sharing.

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[15] *See, Local Telephone Competition: Status as of December 31, 2002*, Industry Analysis and Technology Division of the Wireline Competition Bureau, at 1 and Table 4 (June 2003).

Line-sharing allows *any consumer* to use a competitive alternative to RBOC and independent ILEC DSL services. By contrast, line-splitting allows only a small group of consumers who, first, use a CLEC local service and, second, have a voice CLEC who is willing to share the data portion of its loop with a data CLEC. The overwhelming market power of an RBOC and independent ILEC in this scenario makes assertions that line-splitting is a real alternative to line-sharing unrealistic. The FCC's *TRO*, however, summarily concludes that line splitting is readily available to competitors, without any record to support that position. Moreover, in affirming the FCC's findings regarding line-sharing, the court below did not even discuss this important issue.

Finally, §251(d)(2) focuses on the services that a requesting carrier seeks to offer, not services that a carrier could potentially offer. *Competitive Telecommunications Association v. FCC*, 309 F.3d 8, 12-13 (DC Cir. 2002). Congress included this requirement in the 1996 Act to allow CLECs to become competitors by entering one market at a time. However, in the *TRO*, the FCC turned this common sense Congressional mandate on its head when it required data-only CLECs to bundle voice and DSL service in competition with the RBOCs and the independent ILECs.

2. The FCC illegally justifies denying open access to broadband pipelines for hybrid-fiber loops and line-sharing, and the resulting loss of competition, by misplaced reliance on only one aspect of the uncodified statements in §706.

Section 706(a) of the 1996 Act states that the FCC and State commissions should encourage "the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" through "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers

to infrastructure investment." Specifically, that section provides:

> The Commission and each State Commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ... by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

Section 706(a) does not elevate infrastructure investment above other means of achieving the Act's goals, but rather shows that Congress considered promoting competition of equal importance to achieving those goals. A reasonable interpretation of §706 does not indicate any intent that this provision of the Act was intended in any way to trump the specific standard in §251(d)(2) that is designed to allow unbundled access when necessary to promote competition. This conclusion is reinforced by the language of §706(b), which considers the possibility that the FCC could find that more steps are needed to encourage deployment of advanced services. Should the FCC make that finding, §706(b) contemplates that the FCC should take action "by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."

However, the FCC has made *no* finding that more must be done to encourage deployment of advanced services. Consequently, the FCC has incorrectly interpreted §706 to place infrastructure investment above the goal of promoting competition. In so doing, the FCC has ignored the clear language of the statute, and has, instead, found that *notwithstanding the impairment finding in the TRO regarding competition*, hybrid-fiber loops and line-sharing need not be unbundled.

Section 706 encourages the FCC as well as the States to foster *both* investment and competition. The FCC ignored this dual mandate. The FCC took this illegal action based on its erroneous belief that unbundled access to hybrid-fiber and line-sharing would chill RBOCs' and independent ILECs' incentives to invest in advanced services. The FCC then concluded that the anticipated reduction in investment justified a national determination that hybrid-fiber and line-sharing should not be made available as a UNE to CLECs.

Moreover, the FCC's discussion in this regard failed to mention that in the case of line-sharing, the copper loops are *already in place*. There can accordingly be no significant "investment" issue in connection with line-sharing. Similarly, in the case of hybrid-fiber loops, many such loops are either already installed or in the process of being installed, as is the case in California. Thus, contrary to the FCC's view, there is in reality no "investment" issue in connection with hybrid-fiber, either. Obviously, other economic incentives, like improving voice-grade service, increased ease of maintenance, and the desire to compete with cable by adding video services to existing telephone lines, have prompted the RBOCs and independent ILECs to invest in the newest telecommunications technologies.[16]

There is consequently no rational basis, in light of the FCC's finding of impairment of competition under §251(d)(2), for the FCC's decision, based on the ancillary policy goals set forth in the uncodified §706, to override the unbundling mandate in §251(d).

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[16] *See*, SBC announcement regarding "Sweeping Broadband Initiative," dated October 18, 1999.

B. The *TRO* Impermissibly Purports to Preempt State Authority to Set Line-Sharing Rates.

By setting federally-prescribed line-sharing rates, and indicating it *will* set rates for access to RBOCs' UNEs provided pursuant to §271 (the 1996 Act's provision that deals with the RBOCs' entrance into long distance market after they have met a checklist of certain market opening criteria), the FCC violates the reservation of State authority to set prices set forth in §152(b) of the 1996 Act. Under this provision, States, not the FCC, establish rates when the parties cannot agree, subject to review by the *federal district courts* pursuant to §252(e)(6) or by State courts.

Congress unambiguously intended States to establish regulations that are consistent with, and do not substantially prevent implementation of §251. No basis exists for writing the States and the federal district courts out of the process. However, the *TRO* finding that carriers cannot have access to the High Frequency Portion of the Loop ("HFPL") precludes States from requiring line-sharing as a UNE, and establishes a three-year transition period to allow CLECs to negotiate new arrangements with RBOCs and independent ILECs to replace line-sharing. *TRO* ¶255-263.

During this transition, the FCC set new rates for CLECs to obtain new line-sharing customers at 25% of State-approved rates for the stand-alone copper loop in the first year of transition, 50% of State-approved rates in the second year, 75% in the third, and 100% of the full cost of the loop by the fourth year. *TRO* ¶¶264-269. This mandate of the *TRO* in effect prevents States from setting rates for line-sharing in any manner other than those dictated by the FCC rules. Thus, in the *TRO*, the FCC has not set a methodology, but an actual rate, by forcing the parties to use the "25/50/100% of the cost of the loop" criteria.

The FCC's action in this regard is in conflict with §252(a)(1) of the 1996 Act, which makes clear that

interconnection agreements must specify the rates and the specific elements to be provided. While the Supreme Court found in *AT&T v. Iowa Utilities Bd.*, *supra*, that the Act is "not a model of clarity," at least two provisions *are* clear: (1) when interconnection agreements are negotiated, they are to be submitted to State commissions for approval, but if negotiations fail, "either party can petition the State commission . . . to arbitrate open issues." 525 U.S. at 373-374, and (2) with respect to rates established in such arbitrations "[i]t is the States that will . . . [determine] the concrete result in particular circumstances." *Id.*, at 384.

Additionally, the FCC's determination to eliminate line-sharing as a UNE is in direct conflict with the requirements of §271 of the 1996 Act. Under §271, the RBOCs have to make available access to HFPL, *as well as the other specified network elements*, as a checklist item.

The FCC claims such access should be at "just and reasonable rates" under 47 U.S.C. §§201-202 instead of using TELRIC pricing. However, instead of the §252(d)(1) cost standard, the *TRO* finds that the general "just and reasonable" standard of §§201 and 202 applies. *TRO* ¶¶656-664. The FCC also suggests that whether the RBOCs have complied with those sections is to be determined *by the FCC* "in an enforcement proceeding brought pursuant to section 271(d)(6)." *TRO* ¶664. Those determinations are inconsistent with the Congressionally-mandated State arbitration scheme and the plain language of the Act.

Section 252(c)(2) says State Commission's shall "establish any rates for . . . elements" and that rates for elements are determined "according to (§252(d)(1))."

Congress intended that provision, not §§201-202,[17] to govern pricing of elements. After the Supreme Court's *AT&T v. Iowa Utilities Bd.*, *supra*, decision, the Eighth Circuit vacated specific element "proxy rates" established by the FCC, noting:

> [t]he Supreme Court held that the FCC 'has jurisdiction to design a pricing methodology.' (citation omitted) . . . However, the FCC does not have jurisdiction to set the actual prices for the state commissions to use. Setting specific prices goes beyond the FCC's authority . . . and intrudes on the states' right to set the actual rates pursuant to §252(c)(2). *AT&T v. Iowa Utilities Bd.*, 219 F.3d at 757.[18]

The *TRO's* finding that *the FCC* will examine the rates for RBOC elements and determine if they comply with the Act also "intrudes on the States' right to set the actual rates." Rates for elements, whether provided pursuant to §251 or §271, are provided in *interconnection agreements*.[19] Congress intended the §271 checklist to include "what must, at a minimum, be provided by a [RBOC] in any interconnection agreement approved under section 251." S. Rep. 104-23, 104th Cong., 1st Sess. 43

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[17] Nothing in §§201-202 provides the FCC with authority to either (1) set rates of elements in a disputed interconnection agreement or in freely negotiated agreements subject to State approval, or (2) require States to use a different standard in those arbitrations.

[18] The Eighth Circuit's decision invalidating TELRIC was later reversed in *Verizon Communications Inc. v. FCC*, *supra*. The judgment vacating the proxies was not even challenged.

[19] As was discussed above, in §251(d)(3), Congress preserved State authority to establish unbundling obligations in addition to those established by federal law and, in §252(e)(3), clarified that States may enforce those requirements while arbitrating interconnection agreements. Whatever the source of UNEs – §251(c)(3), the checklist, or State law, Congress meant for them to be reflected in interconnection agreements.

(1995). Section 252 provides that States should arbitrate disputes over rates and establish those rates when the parties cannot agree.

Nothing in the Act allows an RBOC to establish rates for elements subject to the FCC's review in an interconnection agreement that goes to arbitration. The States, *not the FCC*, have the responsibility to establish rates when the parties cannot agree, subject to review by the *federal district courts* pursuant to §252(e)(6). There is simply no basis in the statute for the FCC to write State Commissions out of the rate-setting process and state and federal district courts out of the review process.

C. Contrary to the 1996 Act, the *TRO* Impermissibly Purports to Preempt State Authority to Require Line-Sharing as a UNE.

1. The statutory language precludes FCC preemption of State unbundling regulations that are not inconsistent with, and that do not substantially prevent implementation of, §251's requirements.

TRO ¶195 precludes States from enacting access obligations "for which the Commission has . . . found no impairment . . . or otherwise declined to require unbundling." Congress' unambiguous intent in §251(d)(3) was to permit the States to establish regulations that are consistent with and do not substantially prevent implementation of §251 of the 1996 Act. While §251(d)(3) contemplates that the FCC will prescribe regulations, that prescription cannot and does not preempt State authority to carry out those functions that the 1996 Act allocates to them. However, in the *TRO*, the FCC violates §251(d)(3) by eliminating the long-standing requirement that RBOCs and independent ILECs lease the high frequency portion of their copper loops (*see*, *TRO* at ¶¶248-271) and by purporting to preempt states such as California from

invoking its §251(d)(3) authority based on State-specific facts.

A correct view of the FCC's mandate under §251 is that it sets an "outer envelope" regarding its determinations of local access obligations, which states can follow if it fits the competitive market places in an individual State. Ironically, the court below, in its earlier *USTA I* decision, *supra*, called for a granular analysis, to be conducted by the States, of whether competition exists as a means to determine whether impairment is appropriate in a given marketplace.

2. The FCC has erroneously written State commissions' preserved authority out of the Act.

Moreover, "[t]o permit an agency to expand its power in the face of a Congressional limitation of its jurisdiction would be to grant to the agency power to override Congress." *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374-5 (1986) ("*Louisiana*"). In the *TRO*, the FCC exceeds the scope of its own authority by overriding Congress' clearly articulated preservation of State law. The FCC claim that its regulations have preemptive force because they implement §251(d) is a *non sequitur*. Section 251(d)(3) expressly contemplates that the FCC will be "prescribing and enforcing regulations."

However, the mere act of promulgating regulations, standing alone, cannot preempt the States. Congress did not intend to allow the FCC to avoid the §251(d)(3) reservation by simply undertaking a rulemaking. Indeed, that section, on its face, denies preemptive effect to FCC

rulemakings. The FCC's bootstrapping effort also finds no support in the precedent it cites.[20]

When Congress includes an express savings clause in a statute, that clause must be construed as having independent, operative effect. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 868, 870 (2000). Here, the only way to give independent effect to §251(d)(3) is to acknowledge that it preserves the authority of individual State commissions to foster local competition through additional unbundling requirements.

Moreover, the FCC improperly asserts in the *TRO* that §252(c)(1) of the Act equates §251's requirements to the FCC's regulations implementing §251. However, the absence in §251(d)(3)(B-C) of any specific provision that "regulations" are preemptive undermines the *TRO*'s usurpation of power claim. Section 252(c)(1) expressly refers to "the requirements of §251 of this title, including the regulations prescribed by the Commission pursuant to §251 of this title." 47 U.S.C. §252(c)(1). The use of the word "including" merely demonstrates that Congress meant there are other requirements of §251 beyond the FCC's implementation of regulations, such as the preservation of State authority created by §251(d)(3). It does not

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[20] *See*, *TRO* ¶193 & n. 613, where the FCC cites *Fidelity Federal Savings & Loan Assn. v. De La Cuesta*, 458 U.S. 141 (1982), for the proposition that federal preemption of State law does not require express Congressional authorization. That case is not on point because, unlike here, there was no express statutory provision preserving State authority. The FCC also quotes *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (*"New York"*), for the proposition that "[t]he statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof." The portions of the *TRO* that preempt preserved State authority are unauthorized by the Act. Moreover, *New York* further holds that federal regulations may *not* preempt State law where, as here, the agency's action is on its face "not one that Congress would have sanctioned." *New York*, 486 U.S. at 64.

expand the scope of the FCC's authority to modify preserved state authority.

Finally, the FCC relies on §251(d)(2) as a supposed grant of exclusive authority to make preemptive impairment findings and unbundling determinations. This provision merely states that "the Commission shall consider" impairment. It does not vest exclusive impairment determination powers in the FCC. The FCC's previous attempt to equate its regulations with §251 was rejected by the Eighth Circuit. In a 1996 Order, the agency found State regulations not compliant with its own rules substantially prevented implementation of the requirements of §251. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 15551-52, ¶102 (1996). The Eighth Circuit concluded "[t]he FCC's conflation of the requirements of §251 with its own regulations is unwarranted and illogical." *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 806 (8th Cir. 1997) (*rev'd sub nom.* on other grounds, *AT&T v. Iowa Utilities Bd., supra.*).[21]

3. The FCC impermissibly requires State action to be consistent with its own impairment results.

In attempting to write the statute's plain meaning out of the Act, the FCC also relies on §251(d)(3)(B)'s requirement that State action be consistent with §251. The FCC concedes that State action inconsistent with its regulations is not necessarily preempted. The FCC in the TRO notes that "[t]he Eighth Circuit found that the scope of federal rulemaking authority under section 251 of the 1996 Act . . . interpreted section 251(d)(3) as a further

[21] The FCC did not challenge, nor did the Supreme Court reverse, the Eighth Circuit's holding concerning §251(d)(3).

constraint on Commission authority . . . " The FCC added "[t]hat portion of the Eighth Circuit's opinion reinforces the language of the section, i.e., that State interconnection and access regulations must "substantially prevent" implementation of the federal regime to be precluded and that "merely an inconsistency" between the a state regulation and a Commission regulation was not sufficient for Commission preemption under section 251(d)(3)." *TRO* n.611.

Nevertheless the FCC attempts to evade that concession by asserting that States cannot implement impairment findings that differ from its own. *TRO* ¶195. However, State authority preserved under §251(d)(3) is appropriately measured by consistency with the Act, not by conformance with FCC regulations. As the Eighth Circuit has noted, §251 "does not require all State commission orders to be consistent with all of the FCC's regulations promulgated under section 251 . . . It is entirely possible for a State interconnection or access regulation, order, or policy to vary from a specific FCC regulation and yet be consistent with the overarching terms of section 251." *Iowa Utilities Bd.*, *supra*, 120 F.3d at 806.[22]

4. The FCC's claim that §261 constrains State unbundling actions is unjustified.

Finally, the FCC attempts to justify preemption of State law based upon "general restraints on State actions found in sections 261(b) and (c) of the Act." *TRO* ¶192. This argument ignores the Eighth Circuit's conclusion that

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[22] Indeed, the Act authorizes, and in some cases requires, ILECs to provide access to network elements that are not on the national list adopted in FCC regulations. *See* §252(a)(1) (authorizing interconnection agreements without regard to the requirements of §251); §271(c)(2) (requiring access to elements without regard to whether they are on the national list).

these two subsections "refer to separate state rules that do not directly pertain to the matters found in sections 251 through 261 (Part II) of the Act." *Iowa Utilities Bd.*, *supra*, 120 F.3d at 807. Thus, any §261 restraints on State authority simply do not apply to unbundling rules promulgated under §251.

5. There is no credible argument that California's claims in this case are not ripe for review.

The Court below found that the State petitioners' challenge to the preemptive scope of the Order was not ripe. *USTA II*, *supra*, 359 F.3d, at 594. However, California challenges the very notion that the FCC has, or ever had, the legal ability to purport to preempt State rules preserving hybrid-fiber loops and line-sharing as UNEs.

Since it is clear from the foregoing discussion that California has the authority under §251(c)(3) of the 1996 Act, to make its own UNE determinations, California has determined under that authority to establish line-sharing as a local access obligation on its RBOCs. *See* CPUC Decision D.03-077. This section gives California (and other States) the authority to establish local access obligations that are different than those established by the FCC when the State's unbundling regulations or policies neither conflict with, nor substantially prevent implementation of, the Act's unbundling provisions. The 1996 Act allows for such disparate results, because the 1996 Act recognized that States such as California with a large and diverse population might have different telecommunications needs from other states. In other words, the 1996 Act recognized that a single, unitary competitive marketplace allowing for no deviation from a "one size fits all" federal model mandated by the FCC in fact does not "fit all."

D. The Court of Appeal Unlawfully Restricted the Role of State Commissions by Invalidating the FCC's Earlier Decision to Delegate to the States the Job of Making Unbundling Determinations Regarding the Network Elements of Switching and Dedicated Transport

The court below asserts that the FCC cannot lawfully delegate its ultimate authority to make unbundling determinations to State commissions. *USTA II*, *supra*, 359 F.3d, at 565. The court asserts that such delegation would frustrate the intent of Congress under §252(d)(2), fails to establish an objective standard for State commissions to ensure compliance with the 1996 Act, and is inconsistent with the holdings of *AT&T v. Iowa Utilities Bd.*, *supra*, and the mandate of the court below in *USTA I*, *supra*.

However, contrary to the interpretation of the court below, the FCC's interpretation of its §251(d)(2) authority as allowing States to implement the federal unbundling methodology was proper. *TRO* ¶186-190. Sections 201(b) and 251(d)(1) of the 1996 Act authorize the FCC to established rules which are "necessary" to implement the requirements of §251(c)(3) and §251(d)(2) that are both reasonable and in the public interest. In accordance with *USTA I*, the FCC properly provided a methodology for states to use in making granular localized market-based impairment determinations within the parameters set forth in §251. The FCC's delegation properly acknowledged State authority to make unbundling determinations under the 1996 Act. Given the language of the 1996 Act and its purpose to promote competition and innovation, a role for the States in making impairment decisions to determine network element access is reasonable, consistent with Congressional intent, and was properly within the FCC's discretion.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX CONTENTS

APPENDIX A:

Opinion, *United States Telecom Association v. FCC*, Court of Appeals for the District of Columbia Circuit, 359 F.3d 554 (March 2, 2004) 1a

APPENDIX B:

Relevant Provisions of the Federal Communications Commission's Triennial Review Order, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* CC Docket No. 01-338 *et al.*, FCC 03-36, ¶¶ 114, 186, 189, 192-193, 195-196, 222-224, 228-119, 234, 245, 248-271, 286, 656-664 and notes 611, 613 and 614 ..... 73a

APPENDIX C:

Relevant Sections of the Telecommunications Act of 1996

47 U.S.C. § 152 ..... 106a

47 U.S.C. § 160 ..... 107a

47 U.S.C. § 201 ..... 109a

47 U.S.C. § 202 ..... 110a

47 U.S.C. § 251 ..... 111a

47 U.S.C. § 252 ..... 120a

47 U.S.C. § 261 ..... 129a

47 U.S.C. § 271 ..... 129a

APPENDIX D:

List of Additional Parties 142a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES TELECOM
ASSOCIATION, Petitioner
v.
FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, Respondents.
BELL ATLANTIC TELEPHONE COMPANIES,
ET AL., Intervenors

No. 00-1012, Consolidated with 00-1015, 00-1025,
01-1075, 01-1102, 01-1103, 03-1310, 03-1311,
03-1312, 03-1313, 03-1314, 03-1315, 03-1316,
03-1317, 03-1318, 03-1319, 03-1320, 03-1324,
03-1325, 03-1326, 03-1327, 03-1328, 03-1329,
03-1330, 03-1331, 03-1338, 03-1339, 03-1342,
03-1347, 03-1348, 03-1360, 03-1372, 03-1373,
03-1385, 03-1391, 03-1393, 03-1394, 03-1395,
03-1400, 03-1401, 03-1424, 03-1442

January 28, 2004, Argued
March 2, 2004, Decided

Before: EDWARDS and RANDOLPH, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

WILLIAMS, Senior Circuit Judge

The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151 et seq. (the "Act"), sought to foster a competitive market in telecommunications. To enable new firms to enter the field despite the advantages of the incumbent local exchange carriers ("ILECs"), the Act gave the Federal Communications

Commission broad powers to require ILECs to make "network elements" available to other telecommunications carriers, *id.* §§ 251(c)(3),(d), most importantly the competitive local exchange carriers ("CLECs"). The most obvious candidates for such obligatory provision were the copper wire loops historically used to carry telephone service over the "last mile" into users' homes. But Congress left to the Commission the choice of elements to be "unbundled," specifying that in doing so it was to

> consider, at a minimum, whether . . . the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

Id. § 251(d)(2) (emphasis added).

The Act became effective on February 8, 1996, a little more than eight years ago. Twice since then the courts have faulted the Commission's efforts to identify the elements to be unbundled. The Supreme Court invalidated the first effort in *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 389-90, 142 L. Ed. 2d 834 (1999) ("*AT&T*"). We invalidated much of the second effort (including separately adopted "line-sharing" rules) in *United States Telecom Association v. FCC,* 351 U.S. App. D.C. 329, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"). The Commission consolidated our remand in that case with its "triennial review" of the scope of obligatory unbundling and issued the Order on review here. *See Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket Nos. 01-338 et al., FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003) ("Order"); Errata,

18 FCC Rcd 19020 (Sep. 17, 2003). Again, regrettably, much of the resulting work is unlawful.

After a brief summary of the legal background, we address first the ILECs' claims, then the CLECs" claims, then the ILEC and CLEC claims relating to a special area, enhanced extended links ("EELs"), and finally a couple of miscellaneous claims.

I. *Legal Background*

Section 251(c)(3) of the Act imposes on each ILEC the duty to provide any requesting telecommunications carrier with

> access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with . . . the requirements of this section and section 252 of this title.

47 U.S.C. § 251(c)(3).

The statute says that the ILECs may charge a "just and reasonable rate" for these unbundled network elements ("UNEs"), *see id.* § 252(d)(1), and the Commission adopted as its standard "total element long-run incremental cost," or "TELRIC." Under this criterion UNE prices are to be "based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers." 47 CFR § 51.505(b)(1). In litigation over this pricing rule, which the Supreme Court upheld in *Verizon Communications v. FCC,* 535 U.S. 467, 152 L. Ed. 2d 701, 122 S. Ct. 1646

(2002) ("*Verizon*"), it appears to have been common ground that, because of ongoing technological improvement (among other things), prices so determined would fall well below the costs the ILECs had actually historically incurred in constructing the elements. *Id.* at 503-04, 508-09. Certainly the ardent preferences of the parties as to the scope of the Act's unbundling requirements – the ILECs seeking a narrow reading, the CLECs seeking a broad one – suggest such a relationship.

In its first effort to interpret the "impairment" standard of § 251(d)(2), the Commission held that lack of unbundled access to an element would "impair" a CLEC's ability to provide telecommunications service "if the quality of the service the entrant can offer, absent access to the requested element, declines and/or the cost of providing the service rises." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499, 15643 (1996) ("First Report and Order"), ¶ 285.

The Supreme Court found this reading of "impair" unreasonable in two respects. First, the Commission had irrationally refused to consider whether a CLEC could self-provision or acquire the requested element from a third party. *AT&T*, 525 U.S. at 389. Second, the Commission had considered *any* increase in cost or decrease in quality, no matter how small, sufficient to establish impairment – a result the Court concluded could not be squared with the "ordinary and fair meaning" of the word "impair." *Id.* at 389-90 & n.11. The Court admonished the FCC that in assessing which cost differentials would "impair" a new entrant's competition within the meaning

of the statute, it must "apply *some* limiting standard, rationally related to the goals of the Act." *Id.* at 388.

Responding to the *AT&T* decision, the Commission adopted a new interpretation under which a would-be entrant is "impaired" if, "taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element *materially diminishes* a requesting carrier's ability to provide the services it seeks to offer." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3725 (1999) ("Third Report and Order"), ¶ 51 (emphasis added). But in *USTA I* we held that this new interpretation of "impairment," while an improvement, was still unreasonable in light of the Act's underlying purposes.

The fundamental problem, we held, was that the Commission did not differentiate between those cost disparities that a new entrant in *any* market would be likely to face and those that arise from market characteristics "linked (in some degree) to natural monopoly . . . that would make genuinely competitive provision of an element's function wasteful." *USTA I,* 290 F.3d at 427. This distinction between different kinds of incumbent/entrant cost differentials is qualitative, not merely quantitative, which is why the Commission's addition of a requirement that the cost disparity be "material" was inadequate. *Id.* at 427-28.

We also made clear that the Commission's broad and analytically insubstantial concept of impairment failed to

pursue the "balance" between the advantages of unbundling (in terms of fostering competition by different firms, even if they use the very same facilities) and its costs (in terms both of "spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities," *id.* at 427), a balance that we found implicit in the *AT&T* Court's insistence on an unbundling standard "rationally related to the goals of the Act," *id.* at 428 (quoting *AT&T*).

We also objected to the Commission's decision to issue, with respect to most elements, broad unbundling requirements that would apply "in every geographic market and customer class, without regard to the state of competitive impairment in any particular market." *USTA I,* 290 F.3d at 422. Though the Act does not necessarily require the Commission to determine "on a localized state-by-state or market-by-market basis which unbundled elements are to be made available," *id.* at 425 (quoting Third Report and Order, 15 FCC Rcd at 3753, ¶ 122), it does require "a more nuanced concept of impairment than is reflected in findings . . . detached from any specific markets or market categories." *USTA I,* 290 F.3d at 426. Thus, the Commission is obligated to establish unbundling criteria that are at least aimed at tracking relevant market characteristics and capturing significant variation.

Finally, we vacated the Commission's decision to require ILECs to unbundle the high-frequency portion of their copper loops to requesting CLECs – a practice known as "line sharing" and used by CLECs to provide broadband DSL service – because the Commission had failed to consider adequately whether intermodal competition from cable providers tilted the balance against this form of unbundling in the broadband market.

In response to *USTA I* the Commission again revised its definition of impairment. This time around, the Commission determined that a CLEC would "be impaired when lack of access to an incumbent LEC network element poses a *barrier or barriers to entry,* including operational and economic barriers, that are *likely to make entry into a market uneconomic.* That is, we ask whether all potential revenues from entering a market exceed the costs of entry, taking into consideration any countervailing advantages that a new entrant may have." Order ¶ 84 (emphasis added). The Commission clarified that the impairment assessment would take intermodal competition into account. *Id.* ¶¶ 97-98.

The Commission responded to our demand for a more "nuanced" application of the impairment standard by purporting to adopt a "granular" approach that would consider "such factors as specific services, specific geographic locations, the different types and capacities of facilities, and customer and business considerations." *Id.* ¶ 118. Where the Commission believed that the record could not support an absolute national impairment finding but at the same time contained too little information to make "granular" determinations, it adopted a provisional nationwide rule, subject to the possibility of specific exclusions, to be created by state regulatory commissions under a purported delegation of the Commission's own authority.

The Commission also resolved to use the "at a minimum" language in § 251(d)(2) to "inform [its] consideration of unbundling in contexts where some level of impairment may exist, but unbundling appeared likely to undermine important goals of the 1996 Act." *Id.* ¶ 173. Specifically, in connection with two broadband elements,

"fiber-to-the-home" ("FTTH") and hybrid loops (*see* below), it brought into the balance the risk that an unbundling order might deter investment in such facilities – contrary, as it saw the matter, to the statutory goal of encouraging prompt deployment of "advanced telecommunications capability." *Id.* ¶¶ 172-73 (quoting § 706 of the Act). Additional issues also emerged in the rulemaking and will be addressed below.

The ILECs filed two mandamus petitions with this Court, arguing that the Order violated our decision in *USTA I*, and in addition filed a petition for review here. Various CLECs, state commissions, and an association of state utility consumer advocates filed petitions for review in several other circuits; these petitions were transferred to the Eighth Circuit under the random lottery procedure established in 28 U.S.C. § 2112(a)(3), and then transferred to this court by the Eighth Circuit under 28 U.S.C. § 2112(a)(5). We consolidated the petitions for review with the mandamus petitions.

II. *ILEC Objections*

A. *Unbundling of Mass Market Switches*

The Commission made a nationwide finding that CLECs are impaired without unbundled access to ILEC switches for the "mass market," consisting of residential and relatively small business users. This finding was based primarily on the costs associated with "hot cuts" (discussed below), which must be performed when a CLEC provides its own switch. Order ¶¶ 464-75. But the Commission, apparently concerned that a blanket nationwide impairment determination might be unlawfully overbroad in light of the record evidence of substantial market-by-market variation in hot

cut costs, delegated authority to state commissions to make more "nuanced" and "granular" impairment determinations.

First, the Commission directed the state commissions to eliminate unbundling if a market contained at least three competitors in addition to the ILEC, *id.* ¶¶ 498-503, or at least two non-ILEC third parties that offered access to their own switches on a wholesale basis, *id.* ¶¶ 504-05. For purposes of this exercise the Commission gave the states virtually unlimited discretion over the definition of the relevant market. *Id.* ¶¶ 495-97. Second, where these "competitive triggers" are not met, the Commission instructed the states to consider whether, despite the many economic and operational entry barriers deemed relevant by the Commission, competitive supply of mass market switching was nevertheless feasible. *Id.* ¶¶ 494, 506-20. The Commission also instructed the states to explore specific mechanisms to ameliorate or eliminate the costs of the "hot cut" process. *Id.* ¶¶ 486-90. The Commission mentioned, for example, the possible use of "rolling" hot cuts, a process in which CLECs could use ILEC switches for some time after a customer selected the CLEC as its provider, and after an accumulation of such customer changes, the ILEC would make all the necessary hot cuts in one fell swoop. *Id.* ¶¶ 463, 521-24. If a state failed to perform the requisite analysis within nine months, the Commission would step into the position of the state commission and do the analysis itself. *Id.* ¶ 190. Finally, the Order provided that a party "aggrieved" by a state commission decision could seek a declaratory ruling from the Commission, though with no assurance when, or even whether, the Commission might respond. *Id.* ¶ 426; *see* also 47 CFR § 1.2.

We consider first whether the Commission's subdelegation of authority to the state commissions is lawful. We conclude that it is not. We then consider whether the Commission's nationwide impairment determination can nevertheless survive, even without the safety valve provided by subdelegation to the states. We conclude that it cannot. We therefore vacate the Commission's decision to order unbundling of mass market switches, subject to the stay discussed in Part VI.

1. *Subdelegation of § 251(d)(2) impairment determinations to state commissions*

The FCC acknowledges that § 251(d)(2) instructs "the commission" to "determine[]" which network elements shall be made available to CLECs on an unbundled basis. But it claims that agencies have the presumptive power to subdelegate to state commissions, so long as the statute authorizing agency action refrains from foreclosing such a power. Given the absence of any express foreclosure, the Commission argues that its interpretation of the statute on the matter of subdelegation is entitled to deference under *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). And it claims that its interpretation is reasonable given the state commissions' independent jurisdiction over the general subject matter, the magnitude of the regulatory task, and the need for close cooperation between state and federal regulators in this area.

The Commission's position is based on a fundamental misreading of the relevant case law. When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a

contrary congressional intent. *See United States v. Giordano,* 416 U.S. 505, 512-13, 40 L. Ed. 2d 341, 94 S. Ct. 1820 (1974); *Fleming v. Mohawk Wrecking & Lumber Co.,* 331 U.S. 111, 121-22, 91 L. Ed. 1375, 67 S. Ct. 1129 (1947); *Halverson v. Slater,* 327 U.S. App. D.C. 97, 129 F.3d 180, 185-86 (D.C. Cir. 1997); *United States v. Mango,* 199 F.3d 85, 90-91 (2d Cir. 1999); *Inland Empire Pub. Lands Council v. Glickman,* 88 F.3d 697, 702 (9th Cir. 1996); *United States v. Widdowson,* 916 F.2d 587, 592 (10th Cir. 1990), vacated on other grounds, 502 U.S. 801 (1991). But the cases recognize an important distinction between subdelegation to a *subordinate* and subdelegation to an *outside party*. The presumption that subdelegations are valid absent a showing of contrary congressional intent applies only to the former. There is no such presumption covering subdelegations to outside parties. Indeed, if anything, the case law strongly suggests that subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization. *See Shook v. District of Columbia Fin. Responsibility & Mgmt. Assistance Auth.,* 328 U.S. App. D.C. 74, 132 F.3d 775, 783-84 & n.6 (D.C. Cir. 1998). *See* also *Nat'l Ass'n of Reg. Util. Comm'rs ("NARUC") v. FCC,* 237 U.S. App. D.C. 390, 737 F.2d 1095, 1143-44 & n.41 (D.C. Cir. 1984); *Nat'l Park and Conservation Assn v. Stanton,* 54 F. Supp. 2d 7, 18-20 (D.D.C. 1999). (We discuss below some cases that might, mistakenly, be thought to support a contrary view.)

This distinction is entirely sensible. When an agency delegates authority to its subordinate, responsibility – and thus accountability – clearly remain with the federal agency. But when an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making. *See*

NARUC, 737 F.2d at 1143 n.41; cf. *Printz v. United States,* 521 U.S. 898, 922-23, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997). Also, delegation to outside entities increases the risk that these parties will not share the agency's "national vision and perspective," *Stanton,* 54 F. Supp. 2d at 20, and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme. In short, subdelegation to outside entities aggravates the risk of policy drift inherent in any principal-agent relationship.

The fact that the subdelegation in this case is to state commissions rather than private organizations does not alter the analysis. Although *United States v. Mazurie,* 419 U.S. 544, 42 L. Ed. 2d 706, 95 S. Ct. 710 (1975), noted that "limits on the authority of *Congress* to delegate its legislative power . . . are [] less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter," *id.* at 556-57 (emphasis added), that decision has no application here: it involved a constitutional challenge to an express *congressional* delegation, rather than an administrative subdelegation, and the point of the discussion was to distinguish the still somewhat suspect case of congressional delegation to purely private organizations.

Two Ninth Circuit cases have invoked *Mazurie* to suggest that limitations on an administrative agency's power to subdelegate might be less stringent if the delegee is a sovereign entity rather than a private group. *See Assiniboine & Sioux Tribes v. Bd. of Oil and Gas,* 792 F.2d 782, 795 (9th Cir. 1986); *Southern Pacific Transp. Co. v. Watt,* 700 F.2d 550, 556 (9th Cir. 1983). But in neither of these cases was this principle necessary to the outcome, and in neither did the court seek to justify the extension of

Mazurie from its context – the validity of an express delegation of Congress's powers.

We therefore hold that, while federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities – private or sovereign – absent affirmative evidence of authority to do so.

The Commission's plea for *Chevron* deference is unavailing. A general delegation of decision-making authority to a federal administrative agency does *not,* in the ordinary course of things, include the power to sub-delegate that authority beyond federal subordinates. It is clear here that Congress has not delegated to the FCC the authority to subdelegate to outside parties. The statutory "silence" simply leaves that lack of authority untouched. In other words, the failure of Congress to use "Thou Shalt Not" language doesn't create a statutory ambiguity of the sort that triggers *Chevron* deference. *See Ry. Labor Exec. Ass'n v. Nat. Mediation Bd.,* 308 U.S. App. D.C. 9, 29 F.3d 655, 671 (D.C. Cir. 1994) ("Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well."); *see* also *Aid Ass'n for Lutherans v. U.S. Postal Service,* 355 U.S. App. D.C. 221, 321 F.3d 1166, 1174-75 (D.C. Cir. 2003); *Motion Picture Ass'n of Am. v. FCC,* 353 U.S. App. D.C. 405, 309 F.3d 796, 801 (D.C. Cir. 2002); *Ethyl Corp. v. EPA,* 311 U.S. App. D.C. 163, 51 F.3d 1053, 1060 (D.C. Cir. 1995).

The FCC invokes a number of other cases in support of its idea of a presumptive authority to subdelegate to

entities other than subordinates. These are inapposite because they do not involve subdelegation of decision-making authority. They merely recognize three specific types of legitimate outside party input into agency decision-making processes: (1) establishing a reasonable condition for granting federal approval; (2) fact gathering; and (3) advice giving. The scheme established in the Order fits none of these models.

First, a federal agency entrusted with broad discretion to permit or forbid certain activities may condition its grant of permission on the decision of another entity, such as a state, local, or tribal government, so long as there is a reasonable connection between the outside entity's decision and the federal agency's determination. Thus in *United States v. Matherson,* 367 F. Supp. 779, 782-83 (E.D.N.Y. 1973), aff'd 493 F.2d 1339 (2d Cir. 1974), the court upheld the decision of the Fire Island National Seashore Superintendent to condition issuance of federal seashore motor vehicle permits on the applicant's acquisition of an analogous permit from an adjacent town. And *Southern Pacific,* 700 F.2d at 556, citing *Matherson,* sustained the Secretary of Interior's conditioning of right-of-way permits across tribal lands on the tribal government's approval. In contrast to these cases, where an agency with broad permitting authority had adopted an obviously relevant local concern as an element of its decision process, the Commission here has delegated to another actor almost the entire determination of whether a specific statutory requirement – impairment – has been satisfied.

Second, there is some authority for the view that a federal agency may use an outside entity, such as a state agency or a private contractor, to provide the agency with

factual information. While *Assiniboine & Sioux Tribes* found that a delegation of decision-making power to a state board would be unlawful, it left open whether reliance by the federal agency on the state board for "nondiscretionary activities such as compiling, hearing, and transmitting technical information might not be permissible and desirable." 792 F.2d at 795. And *National Association of Psychiatric Treatment v. Mendez,* 857 F. Supp. 85, 91 (D.D.C. 1994), upheld a federal certifying agency's decision to hire a private contractor to conduct surveys of residential treatment centers and pass its results on to the agency, which retained final certification authority. While the FCC has sought to characterize the state commissions' role here as fact finding, *see* Order ¶¶ 186, 493, in fact the Order lets the states make crucial decisions regarding market definition and application of the FCC's general impairment standard to the specific circumstances of those markets, with FCC oversight neither timely nor assured. The Commission's attempted punt does not remotely resemble nondiscretionary information gathering.

Our own decision in *Tabor v. Joint Board for Enrollment of Actuaries,* 185 U.S. App. D.C. 40, 566 F.2d 705, 708 n.5 (D.C. Cir. 1977), seems to straddle the two above variants of permissible relationships. There the federal Joint Board for Enrollment of Actuaries, exercising its broad discretion to set conditions for certifying actuaries to administer ERISA pension plans, required applicants *either* to pass a Board exam *or* to pass an exam administered by one of the recognized private national actuarial societies. 566 F.2d at 708 n.5. The court found that the process was "superintended by the Board in every respect," and that the Board had not abdicated its decision-making authority but merely created a reasonable "short-cut," contingent on the

approval of certain private organizations, to satisfy one of the Board's own regulatory requirements. *Id.* The opinions in both *Southern Pacific* (from our first category) and *Mendez* (from our second) invoke *Tabor*.

Neither *Tabor* nor its progeny relied on any principle that subdelegations to outside parties were presumptively valid, since the result in each of these cases was supportable on the theory that no subdelegation of decision-making authority had actually taken place. To the extent that *Tabor*'s citation of *United States v. Giordano,* 416 U.S. 505, 512-13, 40 L. Ed. 2d 341, 94 S. Ct. 1820 (1974), might be thought to suggest that external delegations enjoy the same favorable presumption as internal ones, that suggestion was clearly rejected by our decision in *Shook,* 132 F.3d at 783-84 & n.6.

Third, a federal agency may turn to an outside entity for advice and policy recommendations, provided the agency makes the final decisions itself. Thus in *Shook,* 132 F.3d at 784, we disapproved the D.C. Control Board's delegation of governance powers over D.C. schools to a private Board of Trustees, but we suggested that the Control Board could use an entity of that sort "as an advisory board charged with recommending certain actions and policies to the Control Board." *See* also *Stanton,* 54 F. Supp. 2d at 19-20 & n.6; *Mendez,* 857 F. Supp. at 91. An agency may not, however, merely "rubber-stamp" decisions made by others under the guise of seeking their "advice," *see Assiniboine & Sioux Tribes,* 792 F.2d at 795, nor will vague or inadequate assertions of final reviewing authority save an unlawful subdelegation, *see Stanton,* 54 F. Supp. 2d at 19, 20-21.

Finally, the Commission's claim that *Diamond International Corp. v. FCC,* 201 U.S. App. D.C. 30, 627 F.2d 489, 492-93 (D.C. Cir. 1980), and *New York Telephone Co. v. FCC,* 631 F.2d 1059, 1065 (2d Cir. 1980), uphold "virtually indistinguishable" FCC subdelegations to state commissions, FCC Br. at 25, is (or should be) embarrassing. These cases involved a wholly unrelated issue: whether the FCC properly interpreted the Communications Act when it decided to permit carriers to file state tariffs for local services used in connection with interstate services. The issue was not delegation of federal authority but rather the scope of federal authority to preempt state authority.

We note that the ILEC petitioners invoke standard *expressio unius* reasoning to attack the delegation. They point out that other provisions of the Act – e.g., the procedures for arbitration and approval of agreements under § 252 – expressly specify a state role, and urge us to infer congressional preclusion of such a role under § 251(d)(2). We do not rely on this theory. Our conclusion would be unchanged if no provision of the Act mentioned any role for the state commissions, because the general conferral of regulatory authority does not empower an agency to subdelegate to outside parties. That said, the fact that other provisions of the statute carefully delineate a particular role for the state commissions, but § 251(d)(2) does not, reassures us that the our result is consistent with congressional intent.

We therefore vacate, as an unlawful subdelegation of the Commission's § 251(d)(2) responsibilities, those portions of the Order that delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements, and in particular we

vacate the Commission's scheme for subdelegating mass market switching determinations. (This holding also requires that we vacate the Commission's subdelegation scheme with respect to dedicated transport elements, discussed below.) We now turn to whether, without that safety valve, the FCC's national impairment findings for mass market switches can be reconciled with *USTA I*.

2. *Impairment in provision of mass market switching*

Without the (unlawful) innovation of transforming a national impairment finding into a provisional national impairment finding from which state commissions could deviate if they found no impairment under local market conditions, the FCC's Order on mass market switches must stand or fall as a nationwide determination that CLECs are impaired in the mass market without unbundled access to ILEC switches. After reviewing the record, we conclude that we must vacate the (no longer provisional) national impairment finding as inconsistent with our conclusion in *USTA I* that the Commission may not "loftily abstract[] away from all specific markets," 290 F.3d at 423, but must instead implement a "more nuanced concept of impairment," *id.* at 426.

The Commission's national finding of impairment for mass market switches is based on entry barriers related to the need for ILECs to perform "hot cuts" (manual connections) for CLECs if the latter choose to self-provision mass market switches. *See* Order ¶¶ 459, 464-76. A "hot cut" requires an ILEC technician to physically disconnect a customer loop from the ILEC switch (to which the loop was hard-wired) and re-wire the loop to the CLEC switch, while simultaneously reassigning the customer's phone

number from the ILEC switch to the CLEC switch. Order ¶ 465 n.1409. A hot cut must be performed every time a CLEC seeks to connect a new customer. In contrast, ILEC connection of a customer generally only requires a software change (unless the customer had already switched to a CLEC switch, in which case the hot cut must be undone via the same physical re-connection). Order ¶ 465. The Commission explains that, according to evidence in the record, the need to perform hot cuts can delay a CLEC in providing service with its own switch and can cause service disruptions, and that these delays and disruptions, even if minor, can damage customer perceptions of CLEC service and impede the CLECs' ability to compete. Order ¶¶ 466-67.

Though the Commission in its brief alludes to "other operational and economic factors" that might create barriers to competition in mass market switching, FCC Br. at 36, the Order makes clear that the national impairment finding was based solely on hot cuts. Order ¶¶ 459 n.1405 & 476. (The other factors were to be considered by state commissions in the exercise of the unlawfully delegated authority.) There appears to be no suggestion that mass market switches exhibit declining average costs in the relevant markets, or even that switches entail large sunk costs. The Commission nonetheless concluded that hot cut costs are not the sort of cost disparity that a new entrant into any market might face, since they arise due to the fact that "incumbent LECs' networks were designed for use in a single carrier, non-competitive environment," which means that CLECs face operational costs that the ILECs do not. Order ¶ 465.

Though certain sections of the Order suggest that impairment due to hot cut costs might be sufficiently

widespread to support a general national impairment finding even in the absence of more "nuanced" determinations to be made by the state commissions, Order ¶¶ 459, 470, 473, the Commission at other points concludes that a national finding, without the possibility of market-specific exceptions authorized by state commissions, would be inconsistent with *USTA I*. *See* Order ¶¶ 186-88, 196, 425, 485, 493. At the very least, these latter passages demonstrate that the Commission's own conclusions do not clearly support a non-provisional national impairment finding for mass market switches, and thus require us to vacate and remand.

Moreover, we doubt that the record supports a national impairment finding for mass market switches. In another context the Commission has already addressed a kindred issue. Under § 271 of the Act, the subset of ILECs that used to be operating companies of AT&T before its break-up (the Bell Operating Companies, or "BOCs") can enter the interLATA market (the market for calls between different local access and transport areas) only by showing, among other things, that they are providing CLECs adequate unbundled access to various network elements, including local loops. *See* Act § 271(c)(2)(B)(iv). The Commission acknowledges that in that context it has in fact found that the BOCs were doing so "in the quantities that competitors demand and at an acceptable level of quality," *see*, e.g., Memorandum Opinion and Order, *Application by SBC Communications, Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas,* 15 FCC Rcd 18354, 18480 (2000), ¶ 247; Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, To*

Provide In-Region, InterLATA Services in Michigan, 12 FCC Rcd 20543, 20601-02 (1997), ¶ 110. In none of those proceedings did the Commission find the hot cut process inadequate to meet this standard. *See* Separate Statement of Chairman Michael K. Powell Approving in Part and Dissenting in Part, FCC 03-36, 18 F.C.C.R. 16978 ("Powell Statement") at 4. But it distinguished those cases on the ground of uncertainty about whether ILECs would be able to handle the increases in hot cut demand that would flow from denying CLECs access to switches as UNEs. Order ¶ 469 & n.1435. The ILECs contend that in fact hot cut processes are "scalable," so that existing sufficiency can be projected onto larger-scale usage. *See* ILEC Br. at 16 (citing Powell Statement at 5; Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York,* 15 FCC Rcd 3953, 4114 (1999), ¶ 308).

The record on the matter is mixed, perhaps sufficiently so that the Commission's "provisional" assumption to the contrary might be sustainable as an absolute finding, given the deference we would owe the Commission's predictive judgment and the inevitability of *some* over- and under-inclusiveness in the Commission's unbundling rules. But the Commission implicitly conceded that hot cut difficulties could not support an undifferentiated nationwide impairment finding. Order ¶¶ 425, 485, 493. Moreover, we made clear in *USTA I* that the Commission cannot proceed by very broad national categories where there is evidence that markets vary decisively (by reference to its impairment criteria), at least not without exploring the possibility of more nuanced alternatives and reasonably rejecting them. 290 F.3d at 425-26. One can

imagine *the Commission successfully identifying* criteria based, for example, on an ILEC's track record for speed and volume in a market, integrated with some projection of the demand increase that would result from withholding of switches as UNEs. The Commission, however, has made no visible effort to explore such possibilities.

Additionally, the ILEC petitioners suggested several more narrowly-tailored alternatives to a blanket requirement that mass market switches be made available as UNEs. Considering such narrower alternatives is essential in light of our admonition in *USTA I* that the Commission must balance the costs and benefits of unbundling. 290 F.3d at 429. "Rolling" hot cuts are one such proffered alternative. Under that concept the Commission could require unbundled access to ILEC switching on new lines for 90 days (or some other period of time) in order to give the ILEC time to perform the accumulated backlog of hot cuts simultaneously, Order ¶¶ 463, 521-24, or the Commission could require the ILEC to provide unbundled access to its switch only until it was able to perform the hot cut. The FCC's only real answer to these proposed alternatives, at least the only answer that appears in the Order or the FCC's brief, is that the Commission directed the state commissions to consider these alternatives and to implement them if they would remedy impairment. *See* FCC Br. at 38-39; Order ¶¶ 463, 521-24. But since we have held such subdelegation unlawful, that response is unavailable.

Moreover, even if the FCC had adopted some lawful mechanism for making exemptions from its general national rule, it could not necessarily rely on the existence of that mechanism as the sole justification for not adopting a more narrowly tailored rule. While a rational rule that

would otherwise be impermissibly broad can be saved by "safety valve" waiver or exception procedures, the mere existence of a safety valve does not cure an irrational rule. *See ICORE, Inc. v. FCC,* 300 U.S. App. D.C. 16, 985 F.2d 1075, 1080 (D.C. Cir. 1993); *Alltel Corp. v. FCC,* 267 U.S. App. D.C. 253, 838 F.2d 551, 561-62 (D.C. Cir. 1988). And a rule is irrational in this context if a party has presented to the agency a narrower alternative that has all the same advantages and fewer disadvantages, and the agency has not articulated any reasonable explanation for rejecting the proposed alternative.

We therefore vacate the FCC's determination that ILECs must make mass market switches available to CLECs as UNEs, subject to the stay discussed in Part VI below, and remand to the Commission for a re-examination of the issue.

3. *The Commission's definition of "impairment"*

The Commission claims that no party in this litigation has challenged the concept embodied in its new interpretation of "impairment." All the disputes, it says, are about the proper *implementation* of that standard. FCC Br. at 18. Not exactly. For example, although the ILEC petitioners' objections to the Commission's mass market switching provisions are all within the framework of the Commission's subdelegation scheme, a number of them clearly go to the character of the impairment standard embodied in that scheme.

As a general matter the ILECs argue the Commission's impairment standard is so open-ended that it imposes no meaningful constraints on unbundling, and would be unlawful even if applied by the FCC itself. ILEC

Br. at 28; *see* also Separate Statement of Commissioner Kathleen Q. Abernathy Approving in Part and Dissenting in Part, FCC 03-36 at 6-7 & n. 16 (claiming that the Commission's multifactor test is no different from the totality-of-the-circumstances approach struck down in *USTA I*). More specifically, the ILECs claim that the Commission's unbundling test unlawfully permits states to consider as a potential source of impairment retail rates that are held below cost by state regulation against the ILECs' will, and unlawfully precludes consideration of intermodal competition when determining whether a market is suitable for competitive supply.

On the general point about the open-endedness of the Commission's standard, we observe that the Order's interpretation of impairment is an improvement over the Commission's past efforts in that, for the most part, the Commission explicitly and plausibly connects factors to consider in the impairment inquiry to natural monopoly characteristics (declining average costs throughout the range of the relevant market), *see* Order ¶¶ 75-76 & nn.245, 256, 258-59, ¶ 87 & n.283, or at least connects them (in logic that the ILECs do not seem to contest) to other structural impediments to competitive supply. These barriers include sunk costs (Order ¶ 75 & n.244, ¶¶ 76, 80, 86, 88), ILEC absolute cost advantages (Order ¶ 75 & n.247, ¶ 90 & n.302), first-mover advantages (Order ¶ 75 & n.249, ¶ 89), and operational barriers to entry within the sole or primary control of the ILEC (Order ¶ 91). In contrast to the First Report and Order and the Third Report and Order, the Commission has clarified that only costs related to structural impediments to competition are relevant to the impairment analysis.

In light of our remand, this is not the occasion for any review of the Commission's impairment standard as a general matter; it finds concrete meaning only in its application, and only in that context is it readily justiciable. A few general observations are pertinent, however.

Relation of "impairment" to the "at a minimum" clause. We note that there are at least two ways in which the Commission could have accommodated our ruling in *USTA I* that its impairment rule take into account not only the benefits but also the costs of unbundling (such as discouragement of investment in innovation), in order that its standard be "rationally related to the goals of the Act." *See USTA I,* 290 F.3d at 428. One way would be to craft a standard of impairment that built in such a balance, as for example by hewing rather closely to natural monopoly features. The other is to use a looser concept of impairment, with the costs of unbundling brought into the analysis under § 251(d)(2)'s "at a minimum" language. The Commission has chosen the latter, and we cannot fault it for doing so. This is especially true as the statutory structure suggests that "impair" must reach a bit beyond natural monopoly. While for "proprietary" network elements the statute mandates a decision whether they are "necessary," § 251(d)(2)(A), for non-proprietary ones it requires a decision whether their absence would "impair" the requester's provision of telecommunications service, § 251(d)(2)(B). Thus, in principle, there is no statutory offense in the Commission's decision to adopt a standard that treats impairment as a continuous rather than as a dichotomous variable, and potentially reaches beyond natural monopoly, but then to examine the full context before ordering unbundling.

That said, we do note that in at least one important respect the Commission's definition of impairment is vague almost to the point of being empty. The touchstone of the Commission's impairment analysis is whether the enumerated operational and entry barriers "make entry into a market uneconomic." Order ¶ 84. Uneconomic by whom? By *any* CLEC, no matter how inefficient? By an "average" or "representative" CLEC? By the most efficient existing CLEC? By a hypothetical CLEC that used "the most efficient telecommunications technology currently available," the standard that is built into TELRIC? Compare 47 CFR § 51.505(b)(1). We need not resolve the significance of this uncertainty, but we highlight it because we suspect that the issue of whether the standard is too open-ended is likely to arise again.

Intermodal alternatives. As for the ILECs' claim that the Commission's impairment standard unlawfully excludes consideration of intermodal alternatives, we observe that the Commission expressly stated that such alternatives are to be considered when evaluating impairment. Order ¶¶ 97-98, 443. Whether the weight the FCC assigns to this factor is reasonable in a given context is an question that we need not decide, except insofar as we reaffirm *USTA I*'s holding that the Commission cannot ignore intermodal alternatives. 290 F.3d at 429.

Impairment in markets where state regulation holds rates below historic costs. In the name of "universal service," state regulators have commonly employed cross-subsidies, tilting rate ceilings so that revenues from business and urban customers subsidize residential and rural ones. *USTA I,* 290 F.3d at 422. On remand from our decision in *USTA I,* the Commission decided to consider regulated below-cost retail rates as a factor that may

"impair" CLECs in competing for mass market customers. *See* Order ¶ 518. The ILECs object strenuously, and it appears virtually certain that the issue will recur on remand.

The Commission's brief treatment of the issue makes no attempt to connect this "barrier" to entry either with structural features that would make competitive supply wasteful or with any other purposes of the Act (other than, implicitly, the purpose of generating "competition," no matter how synthetic). The Commission rightly says that if prevailing rates are too low to elicit CLEC entry even with the benefit of UNEs, the unbundling mandate will have no consequences. True enough. But it is no defense of a rule to say that it is harmless in those cases where it has no effect at all; that presumably is true even of the most absurd rule.

The interesting case is the one where TELRIC rates are so low that unbundling *does* elicit CLEC entry, enabling CLECs to cut further into ILEC revenues in areas where the ILECs' service is mandated by state law – and mandated to be offered at artificially low rates funded by ILECs' supracompetitive profits in other areas. If the scheme of the Act is successful, of course, the very premise of these below-cost rate ceilings will be undermined, as those supracompetitive profits will be eroded by Act-induced competition. In competitive markets, an ILEC can't be used as a pinata. The Commission has said nothing to address these obvious implications, or otherwise to locate its treatment of the issue in any purposeful reading of the Act.

We recognize, of course, that the historic accounting costs relied upon by state regulators are, like TELRIC

itself, an artificial construct that may not closely track true economic cost. But that is no justification for the Commission's refusal to evaluate the probable consequences of its approach, and to adopt, in the light of those estimations, a policy that it can reasonably say advances the goals of the Act.

B. *Unbundling of High-Capacity Dedicated Transport Facilities*

1. *Unlawfulness of the delegation to the states and the national impairment finding*

The Commission has made multiple impairment findings with respect to dedicated transport elements (transmission facilities dedicated to a single customer or carrier), varying the findings by capacity level. First, it found that competing providers are not impaired without unbundled access to "OCn" transport facilities (very high-capacity transport facilities or bandwiths [sic] within such facilities), Order ¶¶ 359, 372, and all petitioners appear to accept that finding. Second, the Commission found that competitors are impaired without unbundled access to DS1 transport, DS3 transport, and dark fiber transport, but made this nationwide impairment finding subject to variation by state commissions applying specific "competitive triggers." *Id.* ¶ 359; *see* also *id.* ¶¶ 381-93. Explaining this latter decision, the Commission observed that its nationwide impairment findings for DS1, DS3, and dark fiber were based on "aggregated data" and frankly acknowledged that competitive alternatives are available "in some locations." *Id.* ¶ 398. The Commission declared that it did not need to resolve "the factual identification of where alternative facilities exist . . . Because we recognize that the record is insufficiently detailed to make more

precise findings regarding impairment, we delegate to the states, subject to appeal back to this Commission if a state fails to act, a factfinding role to determine on a route-specific basis where alternatives to the incumbent LECs' networks exist such that competing carriers are no longer impaired." *Id.* ¶ 398.

Specifically, the Commission instructed states to apply two competitive triggers on a route-by-route basis. *Id.* ¶¶ 399-401. First, the "self-provisioning" trigger required states to find no impairment if three or more competitors had deployed non-ILEC transport facilities along a specific route. *Id.* ¶¶ 400, 405-09. Second, the "wholesale facilities" trigger required states to find no impairment if two or more competing carriers were immediately able and willing to sell transport along a given route at wholesale rates. *Id.* ¶¶ 400, 412-16. Even where the triggers were not satisfied, the FCC allowed a finding of non-impairment if a state, applying seven criteria (all quite fluid and none quantified), determined that the route was suitable for multiple competitive supply. *Id.* ¶ 410. If a state believed that there was impairment on a specific route despite facial satisfaction of the self-provisioning trigger, it could petition the Commission for a waiver. *Id.* ¶ 411.

As we explained in the mass market switching context, the Commission may not subdelegate its § 251(d) authority to state commissions. Although the Commission characterizes the states' role as "fact-finding," Order ¶ 394, the characterization is fictitious. It is the states, not the FCC, that determine whether the competitive triggers, or the Commission's numerous and largely unquantified alternative criteria, are satisfied; it is the states that issue binding orders, subject only to the Commission's discretionary

review. And, as with mass market switching, the Order itself suggests that the Commission doubts a national impairment finding is justified on this record. *Id.* ¶¶ 360, 394, 398. We therefore vacate the national impairment findings with respect to DS1, DS3, and dark fiber and remand to the Commission to implement a lawful scheme.

2. *Remaining dedicated transport issues*

The ILECs have raised two additional issues about the Commission's treatment of dedicated transport, and the CLECs yet another. We address the ILECs' objections here, and that of the CLECs (which relates to so-called "entrance facilities") below in the portion of the opinion devoted to their claims.

a. *Route-specific analysis of dedicated transport*

In *USTA I* we expressed skepticism regarding whether there could be impairment in markets "where the element in question – though not literally ubiquitous – is significantly deployed on a competitive basis," giving as a specific example interoffice dedicated transport. 290 F.3d at 422. We also instructed the Commission, as noted above, to apply a "nuanced" concept of impairment connected to "specific markets or market categories." *Id.* at 426. Any process of inferring impairment (or its absence) from levels of deployment depends on a sensible definition of the markets in which deployment is counted.

For dedicated transport elements the Commission decided that the appropriate market was not a geographic market (e.g., a Metropolitan Statistical Area ("MSA"), as the ILECs urged, or general customer class), but rather a specific point-to-point route. Thus, for example, the fact

that dedicated transport facilities are widely deployed within one MSA does not, in the Commission's view, necessarily preclude a finding of impairment between two specific points within that MSA, if deployment has not satisfied the Commission's competitive "triggers" on that route.

We do not see how the Commission can simply ignore facilities deployment along similar routes when assessing impairment. Suppose points A, B, and C are all in the same geographic market and are similarly situated with regard to the "barriers to entry" that the Commission says are controlling. *See* Order ¶¶ 84 et seq. Suppose further that multiple competitors supply DS1 transport between points A and B, but only the ILEC and one other CLEC have deployed DS1 transport between A and C. The Commission cannot ignore the A-B facilities deployment when deciding whether CLECs are impaired with respect to A-C deployment without a good reason. The Commission does explain why competition on the A-B route should not be *sufficient* to establish competition is possible on the A-C route, Order ¶ 401, but this cannot explain the Commission's implicit decision to treat competition on one route as *irrelevant* to the existence of impairment on the other. Nor does the Commission explain whether, and why, the error costs (both false positives and false negatives) associated with a route-by-route market definition are likely to be lower than the error costs associated with alternative market definitions. While it may be infeasible to define the barriers to entry in a manageable form, i.e., in such a way that they may usefully be applied to MSAs (or other plausible markets) as a whole, the Commission nowhere suggests that it explored such alternatives, much less found them defective.

b. *Wireless providers' access to unbundled dedicated transport*

In addition to their general challenge to the FCC's provisional national finding that competitors are impaired without access to dedicated transport facilities, the ILEC petitioners also attack the Commission's conclusion that providers of wireless service (also known as commercial mobile radio services, or "CMRS") qualify for unbundled access to these facilities. According to the ILECs, the Commission not only failed to conduct the requisite impairment analysis for wireless providers, but in fact found that wireless growth has been "remarkable": 90% of the U.S. population lives in areas served by at least three wireless providers, 40% of Americans and 61% of American households own a wireless phone, wireless prices have been steadily declining, and 3-5% of wireless customers use wireless as their only phone, treating it as a full substitute for traditional land line service. Order ¶ 53. Although the ILECs implicitly concede that wireless providers would be impaired if they were denied *any* access to ILEC dedicated interoffice transport facilities, they point out that wireless providers have traditionally purchased such access from ILECs at wholesale rates (a transaction classified, since adoption of the Act, under § 251(c)(4)). And the data above clearly show that wireless carriers' reliance on special access has not posed a barrier that makes entry uneconomic. Indeed, the multi-million dollar sums that the Commission regularly collects in its auctions of such spectrum, *see*, e.g., *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services,* Seventh Report, FCC 02-179, 12 F.C.C.R. 12985 (July 3, 2002), Table 1B, and that firms pay to buy already-issued licenses, *see*, e.g., *Annual Report and Analysis of Competitive Market Conditions With*

Respect to Commercial Mobile Services, Eighth Report, FCC 03-150, 18 F.C.C.R. 14783 (July 14, 2003), ¶¶ 42-44, seem to indicate that wireless firms currently expect that net revenues will, by a large margin, more than recover all their non-spectrum costs (including return on capital).

The FCC and the wireless intervenors do not challenge the assertion that the current regime has witnessed a rapidly expanding and prosperous market for wireless service. Rather, they rely on the principle that "evidence that requesting carriers are using incumbent LEC tariffed services" is not "relevant to [the] unbundling determination." Order ¶ 102.

The Commission offers several justifications for its decision to treat special access availability as irrelevant to the impairment analysis. None withstands scrutiny. First, the Commission suggests that it would be

> inconsistent with the Act if we permitted the incumbent LEC to avoid all unbundling merely by providing resold or tariffed services as an alternative. Such an approach would give the incumbent LECs unilateral power to avoid unbundling at TELRIC rates simply by voluntarily making elements available at some higher price.

Order ¶ 102 (footnote omitted). While the possibility to which the Commission points is undeniable, its implications for the Act's implementation aren't as horrifying as the Commission seems to think. After all, the purpose of the Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate. Rather, its purpose is to stimulate competition – preferably genuine, facilities-based competition. Where

competitors have access to necessary inputs at rates that allow competition not only to survive but to flourish, it is hard to see any need for the Commission to impose the costs of mandatory unbundling.

We recognize that, given the ILECs' incentive to set the tariff price as high as possible and the vagaries of determining when that price gets so high that the "impairment" threshold has been crossed, a rule that allowed ILECs to avoid unbundling requirements simply by offering a function at lower-than-TELRIC rates might raise real administrability issues. Those complications might in principle support a blanket rule treating the availability of ILEC tariffed service as irrelevant to impairment. But the FCC hasn't defended its decision in those terms or even tried to explicate these complications. Moreover, where (as here) market evidence already demonstrates that existing rates outside the compulsion of § 251(c)(3) don't impede competition, and where (as here) there is no claim that ILECs would be able drastically to hike those rates, those possible complications recede even farther in the background.

The FCC also suggests that the ILECs' view would effectively read unbundled access out of the Act. Both the Commission and the wireless intervenors argue that this conclusion finds support in *Iowa Utilities I,* which held that ILECs could not avoid unbundling requirements by classifying certain features as "services" rather than "network elements." *Iowa Utils Bd. v. FCC*, 120 F.3d 753, 809. There the ILECs had argued that the legislative history of the Act suggested that functions offered as services were meant to be governed by the resale provisions of § 251(c)(4) rather than the unbundling provisions of § 251(c)(3). In rejecting this argument, the Eighth

Circuit said that the provision "for the resale of telecommunications services . . . does not establish resale as the exclusive means through which a competing carrier may gain access to such services. We agree with the FCC that such an interpretation would allow the incumbent LECs to evade a substantial portion of their unbundling obligation under subsection 251(c)(3)." 120 F.3d at 809. Thus the court found that an ILEC offer of functions for sale as services did not preclude classifying these functions as network elements to be unbundled under § 251(c)(3). But that decision in no way supports a claim that the availability of services for sale under § 251(c)(4) is irrelevant to whether there is impairment of the sort that would require unbundling.

The Commission next argues that considering special access availability in the impairment analysis would "be contrary to the Act's requirement that unbundled facilities . . . should be priced at cost-based rates and our determination that TELRIC is the appropriate methodology for determining those rates. . . ." Order ¶ 102. This is circular. The question is which facilities must be unbundled, or, more specifically, what the relevant benchmark is for assessing whether entry is "impaired" if non-ILECs don't have access to UNEs (at whatever rate the Commission might choose to prescribe).

Finally, the FCC suggests that tariffed services "present different opportunities and risks for the requesting carrier than the use of UNEs or non-incumbent LEC alternatives." Order ¶ 102. This may well be true in certain cases, and on an appropriate record the Commission might find impairment even when services were available from ILECs outside § 251(c)(3). But this possibility doesn't give the Commission carte blanche to omit

consideration of such alternatives in its impairment analysis. And it clearly cannot justify a finding of impairment with respect to wireless, where these different "opportunities and risks" have obviously not made competitive entry uneconomic.

We therefore hold that the Commission's impairment analysis must consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired, and vacate ¶¶ 102-03 of the Order. This of course still leaves the Commission free to take into account such factors as administrability, risk of ILEC abuse, and the like. What the Commission may not do is compare unbundling only to self-provisioning or third-party provisioning, arbitrarily excluding alternatives offered by the ILECs.

C. *Network Modification Requirements*

In *Iowa Utilities I,* the Eighth Circuit struck down an FCC rule that required ILECs to provide interconnection and UNEs superior in quality to those that the ILEC provided for itself. 120 F.3d at 812-13. But the court nonetheless "endorsed the Commission's statement that 'the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements.'" *Id.* 120 F.3d at 813 n.33. The line between impermissible "superior quality" requirements and permissible "modification" requirements is not always clear.

In the Order under review, the Commission "required incumbent LECs to make routine network modifications to unbundled transmission facilities used by requesting

carriers where the requested transmission facility has already been constructed." Order ¶ 632. The Commission elaborated that "routine network modifications" include "those activities that incumbent LECs regularly undertake for their own customers," but do not include "construction of new wires . . . for a requesting carrier." *Id.* Applying this standard, the Commission determined that when ILECs supply high-capacity loops as unbundled elements, they must "engage in activities necessary to activate loops that are not currently activated in the network." *Id.* ¶ 633. The FCC gave as examples of such necessary loop modifications: "rearrangement or splicing of cable; adding a doubler or repeater; adding an equipment case; adding a smart jack; installing a repeater shelf; adding a line card; and deploying a new multiplexer or reconfiguring an existing multiplexer." *Id.* ¶ 634.

The ILECs claim that these passages manifest a resurrection of the unlawful superior quality rules. We disagree. The FCC has established a clear and reasonable limiting principle: the distinction between a "routine modification" and a "superior quality" alteration turns on whether the modification is of the sort that the ILEC routinely performs, on demand, for its own customers. While there may be disputes about the application, the principle itself seems sensible and consistent with the Act as interpreted by the Eighth Circuit. Indeed, the FCC makes a plausible argument that requiring ILECs to provide CLECs with whatever modifications the ILECs would routinely perform for their own customers is not only allowed by the Act, but is affirmatively demanded by § 251(c)(3)'s requirement that access be "nondiscriminatory." We needn't reach that claim, however, since the

FCC's principle is at the very least reasonable and consistent with *Iowa Utilities I*.

The ILECs further object that the Order unlawfully permits states to find that ILECs are not entitled to compensation for making the requested modifications. We agree with the FCC that this challenge will not be ripe for judicial review until a state actually decides how much an ILEC may charge for a specific network modification.

III. *CLEC Objections*

A. *Unbundling of Broadband Loops*

The Commission declined to require ILECs to provide unbundled access to most of the broadband capabilities of mass market loops. In particular, it decided (subject to certain qualifications) not to require unbundling of the broadband capabilities of hybrid copper-fiber loops, Order ¶¶ 288-89, or fiber-to-the-home ("FTTH") loops, *id.* ¶¶ 273-77, and it also decided not to require ILECs to unbundle the high-frequency portion of copper loops, a practice known as "line sharing," *id.* ¶¶ 255-63. The Commission did require ILECs to unbundle the narrowband portion of hybrid loops, Order ¶ 296, but it permitted ILECs to use a different type of technology to connect the fiber feeder loop to the copper distribution portion of the loop than the ILEC itself used, in light of technological and engineering considerations, Order ¶ 297.

The CLEC petitioners attack these decisions as inconsistent with the Act. They argue, first, that CLECs are impaired without access to the broadband capabilities of loops and, second, that the Commission is obligated to unbundle any elements for which impairment has been shown. We consider these claims with respect to each

broadband element in question. We then consider the CLECs' claim that their access to the narrowband portion of hybrid loops is impaired by the FCC's decision permitting ILECs to substitute an allegedly inferior connection technology.

1. *Hybrid loops*

The Commission found some degree of impairment from competitors' lack of unbundled access to hybrid loops, Order ¶ 286, but also found that such impairment "at least partially diminishes with the increasing deployment of fiber," *id.*, and that unbundled access to copper subloops "adequately addresses" that impairment, *id.* § 251. Nonetheless, evidently assuming some degree of impairment, it proceeded to invoke the "at a minimum" language of § 251(d)(2) to weigh other statutory goals against that effect. Noting the directive in § 706(a) of the Act that the Commission should pursue "methods that remove barriers to infrastructure investment," it found that the costs of unbundling hybrid loops – stifling investment by both ILECs and CLECs in advanced telecommunications infrastructure – outweighed the benefits of removing this barrier to competition. *Id.* ¶¶ 286, 288, 290.

The CLECs object to this interpretation of the "at a minimum" clause, arguing that the Act prohibits "ad hoc" balancing of the statute's pro-competition goals with an allegedly conflicting goal derived from the uncodified § 706. They interpret the "at a minimum" clause to mean that the FCC may order unbundling even in the absence of an impairment finding if it finds concrete benefits to unbundling that cannot otherwise be achieved, and that it may refuse to order unbundling in the face of impairment

findings if unbundling would conflict with some other unambiguous requirement of the Act, such as funding universal service.

The CLECs offer two main arguments to support their interpretation of the "at a minimum" clause. First, they claim that the Commission's interpretation contravenes the Act's "stated purpose" of promoting competition, CLEC Br. at 18, a goal that is an "end in itself." *Id.* (quoting *Verizon,* 535 U.S. at 476). But in fact the passage from *Verizon* on which the CLECs rely says that eliminating traditional ILEC monopolies "was considered *both* an end in itself *and* an important step toward the Act's other goals," including "boosting competition in broader markets." 535 U.S. at 476 (emphasis added). Section 706(a) identifies one of the Act's goals beyond fostering competition piggy-backed on ILEC facilities, namely, removing barriers to infrastructure investment. The Commission thus acted reasonably in its interpretation of the "at a minimum" clause.

Second, the CLECs contend that failing to impose unbundling in the face of an impairment finding amounts to an unlawful decision to "forbear" from applying the requirements of § 251(c). *See* §§ 160(a),(d). Here they rely on *Association of Communications Enterprises ("ASCENT") v. FCC,* 344 U.S. App. D.C. 290, 235 F.3d 662, 665-68 (D.C. Cir. 2001), in which, rejecting the Commission's argument that the exclusion of ILEC subsidiaries was a reasonable interpretation of the statutory phrase "successor or assign" in § 251(h)(1)(B)(ii), we held that the FCC couldn't exempt an ILEC subsidiary from § 251(c)(3) obligations unless it complied with the statutory forbearance requirements of § 160.

But § 160, prescribing when the Commission may forbear from applying statutory requirements, obviously comes into play only for requirements that exist; it says nothing as to what the statutory requirements are. Thus *ASCENT* turned on our finding that, even under *Chevron*'s forgiving standard, the Commission's exemption of subsidiaries was inconsistent with the statute. 235 F.3d at 668.

As we noted above in Part II.A.3, there are at least two ways in which the Commission could take into account the frustration of some of the Act's goals – such as encouraging facilities-based competition – that would flow from giving § 251(c)(3) unbundling too broad a scope. It could have built those offsets into its concept of "impairment" by reading that term narrowly, or it could have embraced a relatively broad reading of impairment and then considered, element by element, how an unbundling order might adversely affect the Act's other goals. The CLECs rightly point to *USTA I*'s observation that "impairment" was the "touchstone," 290 F.3d at 425, but that opinion, far from barring consideration of factors such as an unbundling order's impact on investment, clearly read the Act, as interpreted by the Supreme Court in *AT&T,* to mandate exactly such consideration, *id.* at 427-28.

We therefore hold that the Commission reasonably interpreted § 251(c)(3) to allow it to withhold unbundling orders, even in the face of some impairment, where such unbundling would pose excessive impediments to infrastructure investment.

But was the Commission's decision on hybrid loops, on this record, a legitimate application of that principle? The Commission explained that its decision would stimulate

the infrastructure investment contemplated by § 706 in two ways. First, limiting access to the fiber portion of the hybrid loops would give ILECs incentives to deploy fiber (both feeder fiber and, eventually, FTTH), along with associated next-generation networking equipment, and to develop new broadband offerings for mass market consumers. Because unbundling orders reduce return on investment, such orders would inhibit ILECs from making risky investments in next-generation technology. Second, denying CLECs access to ILEC broadband capabilities will stimulate *them* to seek innovative access options for broadband, including self-deployment of new facilities; unbundling, by contrast, would be likely to blunt innovation by locking the CLECs into technological choices made by the ILECs. Order ¶¶ 290, 295.

The Commission also identified two additional considerations that would mitigate any negative impact on local competition in broadband. First, CLECs still have unbundled access to other loop alternatives in the ILEC network, including copper subloops, which allow CLECs to compete in the broadband market. Order ¶ 291. Second, intermodal competition in broadband, particularly from cable companies, means that, even if CLECs proved unable to compete with ILECs in the broadband market, there would still be vigorous competition from other sources. *Id.* ¶ 292.

The CLEC petitioners reject all these justifications, and pose a series of objections. First, they argue, the FCC should redress any investment disincentives for ILEC broadband loop investment not by withholding unbundling, but by modifying the UNE pricing rules. But as we have already held, § 251(d)(2)'s "at a minimum" clause allows the Commission to consider the effect on infrastructure investment when determining what elements must be

unbundled. And the fact that the Commission and the Court have deemed TELRIC a reasonable methodology for pricing UNEs doesn't require the Commission to blind itself to the fact that TELRIC may itself be imperfect and may be implemented still more imperfectly. While the Commission might modify its UNE pricing rules to adequately reduce the negative impacts that it fears, until it has done so it may reasonably consider real-world risks in deciding what elements to unbundle.

Second, the CLECs insist that the record demonstrates that there is no need for additional incentives for investment in broadband infrastructure. With respect to broadband customers served by hybrid loops, ILECs have already extensively deployed fiber feeder loops, and, the CLECs claim, they would continue to do so even without any incentive from expected broadband revenues, since the narrowband cost savings from fiber feeder deployment alone justify ILEC investment in fiber feeder. Provision of broadband involves additional electronic equipment, but the CLECs assert that the costs involved are negligible compared to the fiber upgrade, and that in fact most of these additional investments have already been made. As for alternative means of providing broadband service, the CLECs characterize the FCC's assertion that eliminating unbundled access to hybrid loops would stimulate ILEC investment in FTTH loops as pure speculation, inconsistent with record evidence that there is no consumer demand for services requiring such loops. And they say that the Commission may not tolerate an impairment of competition that would benefit consumers of today in order to create incentives for investment in systems for which there is no evidence of demand by consumers of tomorrow.

The Commission says little in the Order or in its brief to respond the assertion that ILECs would invest in fiber feeder even without revenue from broadband. Indeed, the Commission appears to concede that ILECs are already investing heavily in fiber feeder loops, Order ¶¶ 224, 290, and offers no specific evidence suggesting that unbundling the broadband capabilities of these loops would have a substantial negative impact on this investment. (Nor, to be sure, do the CLECs offer any sort of sophisticated econometric analysis demonstrating the likely marginal impact on investment.)

But there are at least three other aspects of the Commission's investment incentives argument to which the CLEC response is either inadequate or non-existent. First, the Commission suggested that greater incentives may be needed for ILECs to deploy the additional electronic equipment needed to provide broadband access over a hybrid loop. While the CLECs are correct that the Commission concluded that the deployment of this equipment was far less "costly, complex, and risky" than deployment of the fiber feeder, Order ¶ 244, the Commission also noted that this equipment had not been widely deployed, and suggested that ILECs had been deterred by the "regulatory environment." Order ¶ 290 & n.838.

Second, the Commission noted that deployment of feeder fiber is the first step toward FTTH, and that limiting access to ILEC fiber facilities increases incumbents' incentives to develop and deploy FTTH. Order ¶¶ 272, 290. Though the CLECs dismissed this as "pure speculation," the Commission relied on submissions in the record that the CLECs have not directly impeached. Order ¶ 290 n.837. While the CLECs may be right that the Commission's judgment entails increasing consumer costs today in

order to stimulate technological innovations for which there is not yet sufficient consumer demand, there is nothing in the Act barring such trade-offs. Cf. *Consumer Electronics Ass'n v. FCC,* 347 F.3d 291, 300-03 (D.C. Cir. 2003) (upholding Commission rule that increased television prices in order to stimulate transition to digital TV, for which there is little present demand).

Third, the Commission rested its judgment not only on the perceived negative effect of unbundling on *ILEC* investment incentives but also on a conclusion that unbundling hybrid loops would deter *CLECs* themselves from investing in deploying their own facilities, possibly using different technology. Order ¶¶ 288, 290. Although the CLECs argue that this is inconsistent with the Commission's finding that for fiber loops, as for copper loops, "the costs are both fixed and sunk, and . . . deployment is characterized by scale economies," *id.* ¶ 240, that very paragraph, after weighing the various advantages of both ILECs and other entrants, concludes that "the barriers faced in deploying fiber loops, as opposed to existing copper loops, may be similar for both incumbent LECs and competitive LECs." Thus, while declining to unbundle hybrid loops might reduce broadband competition, the Commission reasonably concluded that such a decision might be effective in stimulating investment in all-fiber loops.

We thus believe that, even if the CLECs are correct that unbundling would have no impact on ILEC investment in the fiber feeder portion of hybrid loops, the other investment disincentives the Commission identified are sufficient for us to uphold the reasonableness of the Commission's determination. Reading the Order as a whole, we see little sign that the Commission would have

come out otherwise if it had given the CLEC arguments as much credit as they deserve. *See Indiana Muni. Power Agency v. FERC,* 312 U.S. App. D.C. 283, 56 F.3d 247, 256 (D.C. Cir. 1995); *Carnegie Natural Gas Co. v. FERC,* 297 U.S. App. D.C. 9, 968 F.2d 1291, 1294 (D.C. Cir. 1992).

Nor can we say that the Commission was arbitrary or capricious in thinking that any damage to broadband competition from denying unbundled access to the broadband capacities of hybrid loops is likely to be mitigated by the availability of loop alternatives or intermodal competition. With regard to loop alternatives, we agree with the CLECs that these alternatives are not a perfect substitute for the ILECs' hybrid loops, but we understand the Commission to say only that they are a partial substitute; they will mitigate, not eliminate, CLEC impairment. More important, we agree with the Commission that robust intermodal competition from cable providers – the existence of which is supported by very strong record evidence, including cable's maintenance of a broadband market share on the order of 60%, *see* Order ¶ 292 – means that even if all CLECs were driven from the broadband market, mass market consumers will still have the benefits of competition between cable providers and ILECs. Although the CLECs point to evidence that CLEC broadband competition has played a role in constraining ILEC pricing, *see* Declaration of Robert D. Willig, ¶¶ 206-08, Joint Appendix ("J.A.") 885-87, the evidence itself is hardly rigorous and is offset by conflicting material, *see* Letter of Susanne Guyer, Vice President, Verizon, at 2 (J.A. 2146), itself not rigorous. Thus the Commission's consideration of past pricing effects was not arbitrary, and in any event, as the discussion above shows, its overall judgment turned on a range of factors.

We therefore hold that the Commission's decision not to order unbundling of the broadband capacity of hybrid loops was based on permissible statutory considerations and supported by substantial evidence.

Although the Commission refused to unbundle the broadband portion of hybrid loops, it required ILECs to unbundle the narrowband portion, Order ¶ 296, and the CLECs raise an issue relating to the details of this unbundling. The Commission said for various technical reasons this would be more difficult for hybrid loops that used integrated digital loop carrier ("IDLC") equipment to connect the fiber feeder portion of the loop to the copper distribution portion than it would for those that used universal digital loop carrier equipment ("UDLC"). Order ¶ 297 & n.855.

The CLECs protest that the record "unambiguously established that UDLC substantially degrades the speed and quality of dial-up Internet access," CLEC Br. at 30, though they fail to point us to the portions of the record that supposedly establish this. The Commission acknowledges that "UDLC can, in some circumstances, negatively affect data transmission speed," FCC Br. 84 n.37, but it disputes the severity of the impact. Moreover, the Order requires that ILECs "present requesting carriers a technically feasible method of unbundled access." Order ¶ 297. Given the CLEC petitioners' failure to present or highlight evidence that the impact is severe, or to refute the Commission's technical analysis, we have no basis for finding the Commission decision on this issue arbitrary or capricious.

2. *Fiber-to-the-home ("FTTH") loops*

For FTTH loops, the Commission found relatively little impairment except in a specific, limited domain. Although FTTH deployment showed some characteristics in common with copper loops (the costs being "both fixed and sunk, and deployment [being] expensive," Order ¶ 274), the Commission believed that the revenue opportunities of FTTH deployment were great enough to "ameliorate many of the entry barriers." *Id.*; *see* also *id.* ¶ 276 (same, with respect to FTTH parallel to or in replacement of existing copper plant). With respect to new or so-called "greenfield" FTTH deployments (as for a new subdivision), it denied unbundling without qualification. *Id.* ¶ 275. For the "largely theoretical" scenario in which an ILEC constructed FTTH parallel to or in replacement of its existing copper plant ("overbuild"), it declined to find impairment as to broadband services, *id.* ¶ 276, but agreed with the CLECs' concern that an ILEC might replace and ultimately deny access to the copper loops that CLECs were using to serve mass market customers, *id.* ¶ 277. In the overbuild situations, then, it ruled that the ILEC must either keep the existing copper loop connected after deploying FTTH, or else provide CLECs with unbundled access to the narrowband capabilities of the replacement FTTH loop. *Id.* ¶¶ 277, 281-84.

Although not contesting the *concept* that large expected revenue can offset scale economies, the CLECs do object to the Commission's decision that CLECs are not impaired by lack of unbundled access to FTTH. They argue that the Commission ignored two critical considerations. First, they point out that the FCC made a national finding that CLECs are impaired without unbundled access to enterprise market high-capacity DS3 loops

(which are made from the same fiber as mass market FTTH loops), finding that "a single DS3 loop, generally, can not provide a sufficient revenue opportunity" to overcome the entry barriers to deployment. Order ¶ 320. This, the CLECs say, contradicts the Commission's conclusion that "the substantial revenue opportunities posed by FTTH deployment help ameliorate many of the entry barriers presented by the costs and scale economies." *Id.* ¶ 274. Second, they argue that ILECs enjoy significant "first mover" advantages due to their existing customer base, rights-of-way, and their existing networks' substantial excess fiber capacity ("dark fiber") that ILECs can readily use for network extensions.

While the CLECs' objections are convincing in many respects, they are ultimately unavailing. Even if the CLECs are impaired with respect to FTTH deployment (a point we do not decide), the § 706 considerations that we upheld as legitimate in the hybrid loop case are enough to justify the Commission's decision not to unbundle FTTH. Although the Commission based its refusal to unbundle on a finding of no impairment, it made clear that its decision was "informed" by § 706. Order ¶ 278. In particular, it noted that "removing incumbent LEC unbundling obligations on FTTH loops will promote their deployment of the network infrastructure necessary to provide broadband services to the mass market." *Id.* ¶ 278; *see* also *id.* ¶¶ 272, 290 & n.837.

We find that these considerations are sufficient to justify the Commission's decision not to require FTTH unbundling, even if CLECs are to some extent "impaired" in their ability to enter certain segments of the FTTH broadband market. This conclusion is buttressed by the evidence in the record that FTTH deployment is still very

limited, Order ¶ 274, that both the costs and potential benefits of deployment are high, *id.*, and, at least in some contexts, ILECs and CLECs face similar entry barriers, Order ¶¶ 240, 275 & n.808, ¶ 276. An unbundling requirement under these circumstances seems likely to delay infrastructure investment, with CLECs tempted to wait for ILECs to deploy FTTH and ILECs fearful that CLEC access would undermine the investments' potential return. Absence of unbundling, by contrast, will give all parties an incentive to take a shot at this potentially lucrative market.

3. *Line sharing*

In *USTA I,* 290 F.3d at 428-29, we vacated the Commission's decision to provide CLECs with unbundled access to the high frequency portion of copper loops to provide broadband DSL services, primarily because the Commission had failed to consider the relevance of intermodal competition in the broadband market. On remand, the Commission decided to reverse its earlier position and eliminated this unbundling mandate. The Commission explained its change of heart as follows.

First, the FCC rejected its prior finding that lack of separate access to the high frequency portion would cause impairment. The earlier impairment finding had been based on a notion that broadband revenues would not justify the cost of the whole loop. But now, applying its new decision to focus on *all* the potential revenues from the full functionality of a loop (voice, data, video, and other services), the Commission believes that these revenues would offset the costs associated with purchasing the entire loop. Order ¶ 258. Additionally, the Commission

reasons that CLECs interested only in broadband could obtain broadband frequencies from other CLECs through line-splitting, in which one CLEC provides voice service on the low frequency portion of the loop and the other provides DSL on the high frequency portion. Thus, after taking both costs and revenues into account, the FCC decided that eliminating mandatory line sharing would not impair CLECs' ability to provide broadband service. *Id.* ¶ 259.

The Commission also observed that the difficulties of cost allocation for different portions of a single loop had led most states to price the high frequency portion of the loop at approximately zero. This distorted competitive incentives since CLECs that purchased only the high frequency portion had an irrational cost advantage over both ILECs and CLECs that purchased the whole loop to offer a range of services. Order ¶ 260. The anomalous price differential also skewed CLECs' incentives toward providing only broadband service instead of bundled voice and DSL, discouraged innovative arrangements between voice CLECs and data CLECs, and discouraged product differentiation between ILEC and CLEC offerings. *Id.* ¶ 261. Thus the FCC found the results of mandatory line sharing to be contrary to the Act's goal of encouraging vigorous competition in all local telecommunications markets. *Id.*

Finally, following our mandate in *USTA I*, the Commission noted the substantial intermodal competition from cable companies, which provide nearly 60% of all high-speed lines. Order ¶ 262 & nn.777-78. Although noting that intermodal competition was not "dispositive" in the impairment analysis, the Commission found that it lessened any competitive benefits associated with line sharing. *Id.* ¶ 263. Taking this into account, along with the negative

impact of unbundling on competitive incentives, it found that "the costs of unbundling the [high frequency portion of the loop] outweigh the benefits. . . ." *Id.*

As with FTTH, we find that even if the CLECs are right that there is some impairment with respect to the elimination of mandatory line sharing, the Commission reasonably found that other considerations outweighed any impairment. And again we note the ambiguous state of the record on the price-constraining effect of CLEC DSL service. We read the Commission as concluding that, at least in the future, line sharing is not essential to maintain robust competition in this market, a conclusion based on permissible considerations and supported by evidence in the record. With respect to the skewed incentives from zero pricing of the high frequency portion, it is of course true that alternative cost allocations could have reduced the skew, but any alternative allocation of costs would itself have had some inescapable degree of arbitrariness.

Summary. We therefore uphold the Commission's rules concerning hybrid loops, FTTH, and line sharing on the grounds that the decision not to unbundle these elements was reasonable, even in the face of some CLEC impairment, in light of evidence that unbundling would skew investment incentives in undesirable ways and that intermodal competition from cable ensures the persistence of substantial competition in broadband.

B. *Exclusion of "Entrance Facilities"*

Entrance facilities are dedicated transmission facilities that connect ILEC and CLEC locations. Before the Order, the Commission had defined "dedicated transport facilities" as including entrance facilities. But in the Order

it concluded that this definition was "overly broad," Order ¶ 365, and found that "a more reasonable and narrowly-tailored definition of the dedicated transport network element includes only those transmission facilities *within* an incumbent LEC's transport network, that is, the transmission facilities between incumbent LEC switches," *id.* ¶ 366. Thus it held, as a matter of statutory interpretation, that entrance facilities were not "network elements" subject to the statutory unbundling requirements of § 251(c)(3), *id.*, and accordingly required no impairment analysis, *id.* ¶ 367 n.1119. As this is an issue of statutory construction, we review under the *Chevron* standard.

The CLEC petitioners object that the Commission's interpretation is flatly inconsistent with the text of the Act. In particular, the CLECs point out that § 153(29) of the Act defines "network element" as "a facility of equipment used in the provision of a telecommunications service," and that entrance facilities clearly fall within that definition. Also, the CLEC petitioners continue, the Commission itself, in this Order, addressed the question whether "network element" included only facilities "*actually used by the incumbent LEC* in the provision of a telecommunications service" or also included facilities "*capable of being used* by a requesting carrier in the provision of a telecommunications service regardless of whether the incumbent LEC is actually using the network element to provide a telecommunications service," and expressly adopted the latter definition. Order ¶ 59.

While the Commission's reasoning appears to have little or no footing in the statutory definition, we find the record too obscure to make any final ruling. The CLECs helpfully provide a diagram of various telecommunications network facilities, in which entrance facilities appear as

completely stand-alone items linking a CLEC switch with an ILEC office. CLEC Reply Br. at 3. But no party offers an explanation as to why ILECs rather than CLECs construct these facilities. If (as appears) they *exist* exclusively for the convenience of the CLECs, it seems anomalous that CLECs do not themselves provide them, presumably doing so at the costs associated with "the most efficient telecommunications technology currently available," 47 CFR § 51.505(b)(1), i.e., the TELRIC standard. The Commission hints at this consideration in observing that its ruling encourages CLECs to "incorporate those costs within their control into their network deployment strategies." Order ¶ 367. Thus, although the Commission's ruling superficially violates the statutory language, we simply remand the matter for further consideration. If entrance facilities are correctly classified as "network elements," an analysis of impairment would presumably follow.

C. *Unbundling of Enterprise Switches*

The Commission determined, on a nationwide basis, that CLECs are not impaired by lack of unbundled access to switching for the enterprise market at DS1 capacity and above. Order ¶¶ 451-53. Though observing that the record showed no impairment on a national basis in the absence of unbundling, *id.* ¶ 454, and indeed did "not contain evidence identifying any particular markets where competitive carriers would be impaired," *id.* ¶ 455, the Commission went on to note that "a geographically specific analysis could possibly demonstrate that competitive carriers are impaired without access to unbundled incumbent LEC local circuit switching for DS1 enterprise customers in a particular market," *id.* ¶ 454. It therefore

permitted state commissions to petition the Commission to waive the "no impairment" finding in particular markets. *Id.* ¶¶ 455-58. The operative passages direct the state commissions to "examine" certain issues, and "consider [certain] evidence," and to make "findings." It is obscure what weight the Commission intended to give these findings.

CLEC petitioners argue that the 90-day time limit on this petition procedure is arbitrary and capricious, given that in the mass market switching context the Order gave states nine months to collect and analyze market data. In what appears to be a throwaway sentence, the CLECs say the harm inflicted by this supposed error is "compounded" by the fact that the 90-day state proceedings are voluntary rather than mandatory (i.e., at the option of the state commissions), and that the impairment issue cannot be revisited absent changed circumstances. Order ¶ 455.

Since we have invalidated the FCC's subdelegation scheme with respect to mass market switches, a challenge based on the inconsistency between the nine-month period for mass market determinations and the 90-day period for enterprise market determinations is moot as a practical matter (though not in the strict jurisdictional sense). Cf. *Belton v. Washington Metro. Area Transit Auth.*, 305 U.S. App. D.C. 333, 20 F.3d 1197, 1203 (D.C. Cir. 1994). And in any event, we agree with the FCC that the market data states are to analyze under the enterprise switching provisions are significantly different from the data they were supposed to evaluate in the mass market switching context.

Apart from the argument regarding the inconsistency of time limits, the CLECs' argument boils down to a claim

that the no impairment finding for enterprise switches (1) is overbroad; and (2) lacks sufficient "safety valve" procedures to cure this overbreadth. But the CLECs do not contradict the Commission's observation about the absence of evidence of impairment either nationwide or in specific markets. Thus, in contrast to the mass market switching context, where the evidence indicated the presence of many markets where CLECs suffered no impairment in the absence of unbundling, here there is no showing of any *need* for a safety valve, except insofar as one may infer a need from the Commission's creation of one (which may in fact have been only an excess of caution).

The CLECs make a rather underdeveloped argument that the vice of the alleged time-limit anomaly is "compounded" by the state proceedings being "voluntary rather than mandatory," and that enterprise switching cannot be re-instated after the 90-day period without changed circumstances. CLEC Br. at 40 (citing Order ¶ 455). But these claims seem ancillary to the now-irrelevant time-limit theory, and without a showing of a need for a safety valve, we see no occasion to reach them.

Finally, we note that our holding regarding unlawful subdelegation of FCC authority to state commissions does not control the limited state commission role contemplated in the portion of the Order dealing with enterprise switching. In this context, state commissions are allowed merely to petition the FCC for a waiver of the unbundling order; the FCC has not granted the states authority to make final decisions on such matters as the existence of impairment. Because no party has challenged the limited state role in the enterprise switching context we have no occasion to rule on whether the role contemplated for the states here is legally problematic.

D. *Unbundling of Call-Related Databases and Signaling Systems*

Call-related databases are used in signaling networks for billing or for transmission, routing, and other telecommunications services. These databases include, for example, ones that provide name identification for caller ID service and ones that contain information on calling cards. Order ¶ 549. When CLECs have unbundled access to ILEC mass market switches, they also have access to the databases that the signaling network permits carriers to access. *Id.* ¶ 551. Where CLECs provide their own switches, however, they don't automatically have access to the needed databases, and they must either self-provision or purchase databases from the ILEC or a third party. *Id.*

The Commission determined that CLECs are not impaired without unbundled access to ILEC databases (other than the 911 database) because of the abundance of alternative providers. Order ¶¶ 551-57. The CLECs object, arguing that the only reason alternatives to ILEC databases exist is that the Commission had previously required ILECs to provide unbundled access to their databases (removing any competitive incentive for the ILECs to withhold the databases from third parties). But the CLECs point to nothing in the record demonstrating that this is so. Even if they did, we doubt that this alone would support a finding of impairment. As it stands, CLECs evidently have adequate access to call-related databases. If subsequent developments alter this situation, affected parties may petition the Commission to amend its rule.

E. *Unbundling of Shared Transport Facilities*

The FCC found CLECs that lease ILEC mass market switches are impaired without unbundled access to so-called "shared transport" – transmission facilities shared by more than one carrier, including the ILEC, running between end office switches, between end office switches and tandem switches, and between tandem switches within the ILEC's network. Order ¶¶ 533-34. But the FCC also concluded that, "because switching and shared transport are inextricably linked, if incumbent LECs are no longer obligated to unbundle switching, they should no longer be obligated to unbundle shared transport." *Id.* ¶ 534. In effect, it found that CLECs are entitled to unbundled shared transport only in cases where mass market switching has also been unbundled. *Id.* The CLECs object to this condition for unbundled shared transport, saying that they are "impaired" without access to shared transport between local tandem switches when they "transit" traffic – that is, when they transport traffic that originates on their network to other carriers' networks. The Commission in fact recognized the claim, saying that it proposed to address the issue in a pending rulemaking on intercarrier compensation. *Id.* ¶ 534 n.1640.

Although the FCC failed to resolve an impairment question pressed by the CLECs in this Order, the Commission "need not address all problems 'in one fell swoop.'" *U.S. Cellular Corp. v. FCC,* 349 U.S. App. D.C. 1, 254 F.3d 78, 86 (D.C. Cir. 2001) (quoting *Nat'l Ass'n of Broadcasters v. FCC,* 239 U.S. App. D.C. 87, 740 F.2d 1190, 1207 (D.C. Cir. 1984)). The FCC generally has broad discretion to control the disposition of its caseload, and to defer consideration of particular issues to future proceedings when it thinks that doing so would be conducive to the efficient

dispatch of business and the ends of justice. *See GTE Service Corp. v. FCC,* 251 U.S. App. D.C. 181, 782 F.2d 263, 273-74 (D.C. Cir. 1986) (citing *Nader v. FCC,* 172 U.S. App. D.C. 1, 520 F.2d 182, 195 (D.C. Cir. 1975) and *Cellular Mobile Sys. of Penn., Inc. v. FCC,* 251 U.S. App. D.C. 100, 782 F.2d 182, 197 (D.C. Cir. 1985)). So long as the FCC's decision to postpone consideration of the transiting issue doesn't result in unreasonable delay or impose substantial hardship on the CLECs – which hasn't been shown here – the Commission's choice to organize its rulemaking docket in this way is lawful.

F. *Section 271 Pricing and Combination Rules*

Section 271 of the Act sets conditions for Bell operating companies (the "BOCs") to enter the interLATA long distance market. These conditions include a "competitive checklist," § 271(c)(2)(B), specifying fourteen conditions that a requesting BOC must satisfy before it may provide interLATA service. Checklist item two requires BOCs to provide "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 251(d)(1)," § 271(c)(2)(B)(ii), while checklist items four, five, six, and ten require the BOC to provide unbundled access to, respectively, local loops, local transport, local switching, and call-related databases, §§ 271(c)(2)(B)(iv)-(vi),(x). The FCC reasonably concluded that checklist items four, five, six and ten imposed unbundling requirements for those elements independent of the unbundling requirements imposed by §§ 251-52. In other words, even in the absence of impairment, BOCs must unbundle local loops, local transport, local switching, and call-related databases in order to enter the interLATA market. Order ¶¶ 653-55.

But the FCC also found that the BOCs' unbundling obligations under the independent checklist items differed in some important respects from those under §§ 251-52. Two such differences are salient here. First, the Commission determined that TELRIC pricing was not appropriate in the absence of impairment; for elements for which unbundling was required only under § 271, the ruling criterion is the §§ 201-02 standard that rates must not be unjust, unreasonable, or unreasonably discriminatory. Order ¶¶ 656-64. Second, the Commission decided that, in contrast to ILEC obligations under § 251, the independent § 271 unbundling obligations didn't include a duty to combine network elements.

The CLEC petitioners object to both of these differences, arguing that the independent § 271 unbundling provisions incorporate all the requirements imposed by §§ 251-52, including pricing and combination. Because this is an issue of statutory construction, we review under *Chevron* and defer to the Commission unless Congress has spoken to the precise question at issue (*Chevron* step one) or the Commission's interpretation is unreasonable (*Chevron* step two).

With regard to pricing, the CLECs have no serious argument that the text of the statute clearly demonstrates that the § 251 pricing rules apply to unbundling pursuant to § 271 checklist items four, five, six, and ten. The CLECs contend that checklist item two specifies that the § 252(d)(1) pricing rules apply to all unbundled "network elements," but checklist item two says no such thing. Rather, checklist item two by its terms requires only "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)" – it says nothing suggesting that the requirements of those sections also apply to

the independent unbundling requirements imposed by the other items on the § 271 checklist. The CLECs also claim that it was unreasonable for the Commission to apply a different pricing standard under § 271, but we see nothing unreasonable in the Commission's decision to confine TELRIC pricing to instances where it has found impairment. *See* generally Order ¶¶ 657-64.

As to combinations, the CLECs argue that the Supreme Court decisions in *AT&T* and *Verizon* establish that the nondiscrimination provision in § 251(c)(3), not its reference to "combination," provides the basis for the rules that ILECs may not separate already-combined network elements before turning them over to competitors, and that ILECs must combine unbundled network elements when requested to do so by CLECs. *See* CLEC Br. at 42 (citing *AT&T,* 525 U.S. at 394, and *Verizon,* 535 U.S. at 537).

CLEC reliance on *AT&T* and *Verizon* is misplaced for two reasons. First, as we've already held with regard to pricing, § 271 checklist items four, five, six, and ten do not incorporate any of the specific requirements of § 251(c)(3), including the nondiscrimination prohibition specific to that section. Second, neither *AT&T* nor *Verizon* holds that the § 251(c)(3) nondiscrimination requirement *mandates* the combination rules the FCC promulgated under that section; rather, those cases found the nondiscrimination language in § 251(c)(3) ambiguous and deferred to the agency's reading of it. *AT&T,* 525 U.S. at 394-95; *Verizon,* 535 U.S. at 531-38. These holdings don't necessarily establish that a different rule would be unreasonable. Cf. *Rust v. Sullivan,* 500 U.S. 173, 186-87, 114 L. Ed 2d 233, 111 S. Ct. 1759 (1991).

We agree with the Commission that none of the requirements of § 251(c)(3) applies to items four, five, six and ten on the § 271 competitive checklist. Of course, the independent unbundling under § 271 is presumably governed by the *general* nondiscrimination requirement of § 202. But as the only challenge the CLECs have presented to the FCC's § 271 combination rules is grounded in an erroneous claim of a cross-application of § 251, we do not pass on whether the § 271 combination rules satisfy the § 202 nondiscrimination requirement.

IV. *Unbundling of Enhanced Extended Links ("EELs")*

Enhanced extended links ("EELs") are high-capacity loop/transport combinations that run directly between an end user (usually a large business customer) and an IXC/CLEC office. *Supplemental Order Clarification,* 15 FCC Rcd 9587, 9593 (2000), ¶ 10 n.36. EELs can be used to provide local exchange services, but they can also be used to originate and terminate long-distance calls. IXC providers have traditionally purchased these services from ILECs for long distance purposes as a special access service, i.e., under the ILEC's tariff rather than at TELRIC rates.

In its first Order implementing the 1996 Act, the FCC did not impose any limits on the telecommunications services that a CLEC could provide with the UNEs to which it was entitled access. Order ¶ 134 & n.446 (citing Third Report and Order, 15 FCC Rcd at 3911-12 ¶ 484 and First Report and Order, 11 FCC Rcd at 15671-72 ¶ 356). But in 1999 the FCC modified this principle with respect to EELs, and issued (as an interim measure) a supplemental order that limited access to EELs as UNEs to those

CLECs that would use unbundled EELs to provide "a significant amount of local exchange service." *Supplemental Order,* 15 FCC Rcd 1760, 1760 ¶ 2. The FCC subsequently clarified and refined this principle, adopting three "safe harbors" that required CLECs to certify sufficient local traffic percentages in order to qualify for unbundled access to EELs, *Supplemental Order Clarification,* 15 FCC Rcd 9587, 9598-60 ¶ 22, and restricting "commingling" by CLECs of EELs and tariffed special access services used for interoffice transmission, *id.* at 9602 ¶ 28. We upheld these rules – which the FCC characterized as "interim restrictions" – in *Competitive Telecommunications Ass'n v. FCC,* 353 U.S.App.D.C. 356, 309 F.3d 8 (D.C. Cir. 2002) ("*CompTel*").

In the Order under review, the Commission revised its approach to EELs. First, the Commission generalized the principle underlying its earlier EELs rulings by interpreting the unbundling obligations of § 251(c)(3) to apply only to "qualifying services," defined as "those telecommunications services that competitors provide in direct competition with the incumbent LECs' core services." Order ¶ 139. The FCC also decided that, once a CLEC obtained access to a UNE for a qualifying service, the CLEC could use that UNE to provide additional non-qualifying services. Order ¶ 143. Under these principles, CLECs are entitled to unbundled EELs only if they use these facilities for local exchange service (which counts as a qualifying service), but not for use exclusively for non-qualifying long distance service. Order ¶¶ 591, 595.

The Commission also changed its strategy for enforcing this basic principle and for preventing "gaming" by carriers that, while not bona fide providers of local service, might

seek to take advantage of the low (TELRIC) price of unbundled EELs. It abandoned the "safe harbor" approach, agreeing with the CLECs that this regime had proved intrusive, unworkable, and susceptible to abuse by ILECs. Order ¶ 596 & n.1831, ¶ 614. It also lifted the prohibition on "commingling." *Id.* ¶¶ 579-84. In place of the old restrictions, the Commission established new "eligibility criteria" as prerequisites for a competitor to enjoy the access entitlement of a bona fide provider of a qualifying service. *Id.* ¶¶ 591-611. Each applicant would have to show, first, that it had a state certification to provide local voice service and, second, that at least one local number was assigned to each circuit to be acquired as a UNE. *Id.* ¶¶ 597, 601-02. In addition, the Commission imposed a variety of technical requirements aimed at preventing firms from gaming the system. *Id.* ¶¶ 597, 603-11.

While the Commission admitted that none of the antigaming requirements by itself would prevent gaming, it concluded that they were "*collectively* sufficient to restrict the availability of these UNE combinations to legitimate providers of local voice service." Order ¶ 600 (emphasis in original). It justified this conclusion on the logic that "the burdens and inefficiencies for a provider to meet these criteria for nonqualifying service would deter a carrier of non-qualifying service from re-designing its operations to subvert our rules." *Id.* The Commission also allowed CLECs that met the eligibility criteria, but that currently purchased EELs from ILECs as special access services at wholesale rates (i.e., not TELRIC), to "convert" these wholesale services to UNEs. Order ¶ 586. The CLECs object both to the concept of distinguishing between qualifying and non-qualifying service, and to the eligibility criteria used to implement the distinction.

A. *The Qualifying Service/Non-Qualifying Service Distinction*

The CLECs object to the FCC's decision that long distance is not a "qualifying service," claiming that this conclusion is foreclosed by §§ 251(c)(3) and 251(d)(2)(B) of the Act. Long distance services, including the origination and termination functions performed by EELs, are clearly "telecommunications services," and § 251(d)(2) directs the Commission to provide unbundled access to elements where the lack of such an element "would impair the ability of the telecommunications carrier seeking access to provide the services it seeks to offer." (The Commission assumes, as we believe it must, that the reference to "services" in § 251(d)(2) is meant to refer to the "telecommunications services" covered by § 251(c)(3). Order ¶ 138). The CLECs therefore argue that the FCC cannot arbitrarily exclude them from this impairment analysis.

The Commission asserts that "section 251(d)(2)'s reference to the 'services that [the carrier] seeks to offer' is ambiguous as to the question of which services we should analyze in the context of our impairment analysis." Order ¶ 137 (alteration in original). Having thus "concluded that the language of section 251(d)(2) is ambiguous concerning the scope of the impairment inquiry," Order ¶ 138, the FCC looked to the history and purposes of the Act and concluded that "a reasonable interpretation of the statute" would restrict the impairment inquiry to those services offered in direct competition with ILEC core services such as local voice and data services, *id.* ¶ 139.

In *CompTel* we agreed with the Commission that § 251(d)(2) was ambiguous on the question whether the FCC could make impairment decisions on a service-by-service basis. 309 F.3d at 12. That is, we considered a

situation where an element could be used to provide services A and B, and a carrier requested unbundling for both. We held that the Commission acted reasonably in disaggregating the *impairment* issue, and in ordering unbundling only with respect to the service for which it found impairment. 309 F.3d at 12-13 (service-by-service impairment analysis permissible); 14 (impairment finding made by FCC as to local service but not as to long distance).

Here the Commission asserts an entirely different sort of statutory ambiguity, namely, whether long distance services are "services" at all and therefore require the Commission, on request, to perform an impairment analysis. We are not persuaded by the Commission's claim that the ambiguity regarding the permissibility of service-by-service impairment determinations extends to whether long distance services (or other telecommunications services that do not compete directly with "core" ILEC services) are "services" within the meaning of § 251(d)(2) in the first place. Even under the deferential *Chevron* standard of review, an agency cannot, absent strong structural or contextual evidence, exclude from coverage certain items that clearly fall within the plain meaning of a statutory term. The argument that long distance services are not "telecommunications services" has no support.

The Commission does suggest that the "impairment" requirement is closely linked to natural monopoly conditions that prevail only with respect to the core ILEC services that the Commission defined as "qualifying services." FCC Br. at 77 (citing *USTA I,* 290 F.3d at 427). But that argument addresses impairment, not the definition of "services." We therefore remand those sections of

the Order (¶¶ 132-53) resting the exclusion of "non-qualifying" services on the Commission's reading of the phrase "telecommunications services" in § 251(d)(2)(B).

This does not, of course, necessarily invalidate the Commission's effort to prevent the use of EELs for long distance service. The CLECs have pointed to no evidence suggesting that they are impaired with respect to the provision of long distance services, and in *CompTel* we emphatically held that the Act did not bar a service-by-service analysis of impairment. 309 F.3d at 12-14. The CLECs do not deny that they have been able to purchase use of EELs as "special access." As we noted with respect to wireless carriers' UNE demands, competitors cannot generally be said to be impaired by having to purchase special access services from ILECs, rather than leasing the necessary facilities at UNE rates, where robust competition in the relevant markets belies any suggestion that the lack of unbundling makes entry uneconomic.

On remand, therefore, the Commission will presumably turn to the issue of impairment. Because it may well find none with reference to long distance service, we now turn to the eligibility criteria.

B. *The EEL Eligibility Criteria*

Both the CLECs and the ILECs object to the FCC's eligibility criteria. The CLECs say they are too stringent and are over-inclusive insofar as they preclude access to EELs used to provide services for which CLECs are impaired. The ILECs claim they are too lax and are under-inclusive insofar as they fail to prevent CLECs from using unbundled EELs exclusively for long distance services.

We think that the Commission's eligibility criteria, though imperfect, reflect a reasonable effort to establish an administrable system that balances two legitimate but conflicting goals: the prevention of "gaming" by CLECs seeking to offer services for which they are not impaired, and the preservation of unbundled access for CLECs seeking to offer services for which they are impaired. We accord considerable deference to such administrative determinations, *see WorldCom, Inc. v. FCC,* 345 U.S. App. D.C. 70, 238 F.3d 449, 459 (D.C. Cir. 2001); *Home Box Office, Inc. v. FCC,* 185 U.S. App. D.C. 142, 567 F.2d 9, 60 (D.C. Cir. 1977), and find that the proxies the FCC used, though imperfect (as the Commission itself candidly admits, Order ¶ 600), are neither inconsistent with the Act nor arbitrary and capricious. The Commission also satisfactorily explained both the problems with the regime previously in place (which the ILECs thought should be retained), Order ¶ 614, and with the CLECs' proposed alternatives, *id.* ¶¶ 615-19.

The ILECs make an independent attack on the Commission's decision to allow "conversions" of wholesale special access purchases to UNEs. As we discussed in the section on wireless carriers, the presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access at wholesale rates, i.e., under § 251(c)(4), precludes a finding that the CLECs are "impaired" by lack of access to the element under § 251(c)(3). We realize that this might create anomalies, as CLECs hitherto relying on special access might be barred from access to EELs as unbundled elements, while a similarly situated CLEC that had just entered the market would not be barred. On the other hand, if history showed that lack of access to EELs had not impaired CLECs in the past,

that would be evidence that similarly situated firms would be equally unimpaired going forward. Because we have already determined that we must remand to the Commission, given the invalidity of the line it drew between qualifying and non-qualifying services, the Commission can consider and resolve any potential anomaly on remand.

V. *Miscellaneous*

There remain two loose ends, attacks on the Order by the National Association of State Utility Consumers Advocates ("NASUCA") and by a group of state petitioners. We find that NASUCA lacks standing and that the state petitioners' claim is unripe.

A. *NASUCA's Standing*

NASUCA is a non-profit association of offices, each of which has been designated by its respective state governments to represent the interests of utility consumers in regulatory and judicial proceedings. We agree with the Commission that NASUCA has failed to establish standing pursuant to the requirements of *Sierra Club v. EPA*, 352 U.S. App. D.C. 191, 292 F.3d 895, 899-901 (D.C. Cir. 2002), though for different reasons than those advanced by the Commission.

Under *Sierra Club*, "a petitioner whose standing is not selfevident should establish its standing by the submission of its arguments and any affidavits or other evidence appurtenant thereto at the first appropriate point in the review proceeding." 292 F.3d at 900. A petitioner's standing is self-evident only if "no evidence outside the administrative record is necessary for the court to be sure of it."

Id. at 900. Contrary to the Commission's assertions, we believe that no evidence outside the administrative record is necessary to explain how (on NASUCA's view of the merits) the Order injures the consumers that NASUCA claims to represent. *See NASUCA ex parte letter* (Feb. 13, 2002) at 2-3. On the theories advanced by NASUCA, consumers would enjoy a superior price/quality trade-off in telephone service if the Commission accepted its analysis. But it is not at all self-evident from the record that NASUCA meets the associational standing criteria established in *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 344-45, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977), for entities that are not voluntary membership organizations. *See* also *Fund Democracy, LLC v. SEC,* 349 U.S. App. D.C. 347, 278 F.3d 21, 25-26 (D.C. Cir. 2002); *Am. Legal Found. v. FCC,* 257 U.S. App. D.C. 189, 808 F.2d 84, 89-90 (D.C. Cir. 1987). Although utility consumer interests are clearly affected by the Order, nothing in the administrative record or NASUCA's opening brief establishes that NASUCA is qualified to represent those interests in federal court. We therefore conclude that NASUCA lacks standing and do not reach the merits of its claims.

B. *Ripeness of the State Preemption Claims*

The state petitioners argue that the Order improperly preempts state unbundling regulations that exist independent of the Commission's federal unbundling regulations enacted pursuant to § 251. Specifically, the state petitioners point to ¶ 195 of the Order, which allows "parties that believe that a particular state unbundling obligation is inconsistent with the limits of section 251(d)(3)(B) and (C)" to seek a declaratory ruling from the

Commission, and further predicts that state unbundling requirements for elements that the FCC has determined need not be unbundled under § 251(d)(2) are "unlikely" to be found consistent with the Act.

The state petitioners' challenge to the preemptive scope of the Order is not ripe. The general prediction voiced in ¶ 195 does not constitute final agency action, as the Commission has not taken any view on any attempted state unbundling order. Nor does the states' claim present a purely legal question, as they acknowledge that Commission regulations will lawfully preempt in *some* circumstances. *See Alascom, Inc. v. FCC,* 234 U.S. App. D.C. 113, 727 F.2d 1212, 1218-20 (D.C. Cir. 1984); *see* also *Time Warner Entertainment Co. v. FCC*, 312 U.S. App. D.C. 187, 56 F.3d 151, 193-96 (D.C. Cir. 1995). Besides, the state petitioners have not – and probably could not – identify any substantial hardship that they would suffer by deferring judicial review of the preemption issues until the FCC actually issues a ruling that a specific state unbundling requirement is preempted. We therefore hold the challenge unripe.

VI. *Conclusion*

To summarize: We vacate the Commission's subdelegation to state commissions of decision-making authority over impairment determinations, which in the context of this Order applies to the subdelegation scheme established for mass market switching and certain dedicated transport elements (DS1, DS3, and dark fiber). We also vacate and remand the Commission's nationwide impairment determinations with respect to these elements.

We vacate the Commission's decision not to take into account availability of tariffed special access services when conducting the impairment analysis, and we therefore vacate and remand the decision that wireless carriers are impaired without unbundled access to ILEC dedicated transport.

We vacate the Commission's distinction between qualifying and non-qualifying services, and remand (but do not vacate) the decision that competing carriers are not entitled to unbundled EELs for provision of long distance exchange service.

We remand the Commission's decision to exclude entrance facilities from the definition of "network element" for further development of the record to allow proper judicial review.

The petitions for review are otherwise denied, except for NASUCA's petition, which is dismissed for want of standing, and the state commissions' (and that part of the ILEC petitions relating to compensation for modification of elements), which are dismissed as unripe. The ILECs' mandamus petitions are dismissed as moot.

As to the portions of the Order that we vacate, we temporarily stay the vacatur (i.e., delay issue of the mandate) until no later than the later of (1) the denial of any petition for rehearing or rehearing en banc or (2) 60 days from today's date. This deadline is appropriate in light of the Commission's failure, after eight years, to develop lawful unbundling rules, and its apparent unwillingness to adhere to prior judicial rulings.

So ordered.

APPENDIX B

RELEVANT PROVISIONS OF THE FEDERAL COMMUNICATION COMMISSION'S TRIENNIAL REVIEW ORDER

* * *

REPORT AND ORDER AND ORDER ON REMAND AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: February 20, 2003
Released: August 21, 2003

. . .

114. *Evaluating Impairment Based on the Level of Retail Competition.* We do not adopt a standard that asks whether competition (as opposed to competitive carriers) is "impaired" or base our impairment determination on whether the level of retail competition is sufficient such that unbundling is no longer required to enable further entry. As explained above, evidence of retail competition over non-incumbent LEC facilities informs our analysis of whether competitive LECs are impaired without access to UNEs. But some carriers, for example, suggest that we not require any unbundling in markets where competitors have achieved a particular market share, where competitors have a certain number of collocations, or where consumers have a choice of facilities-based providers. We decline to determine impairment based on a certain level of retail competition because section 251(d)(2) requires us to ask whether requesting carriers are "impaired," not whether certain thresholds of retail competition have been met. While it is true that retail competition is a goal of the 1996 Act, it is not the only goal, and a standard that focused exclusively on retail competition would do so at

the expense of Congress's other goals, such as investment in new facilities. Moreover, the relationship between retail competition and unbundling is complex. In many instances, retail competition depends on the use of UNEs and would decrease or disappear without those UNEs; thus, a standard that takes away UNEs when a retail competition threshold has been met could be circular. While evidence of retail competition over non-incumbent LEC facilities is highly relevant to our impairment analysis as explained above, retail competition that relies on incumbent LEC facilities – whether UNEs, resale, or tariffed services – does less to inform our impairment analysis. We explain in greater detail below why we do not conduct an analysis of individual services, and the levels of competition for those services, below.

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186. The Communications Act assigns the Commission the responsibility for establishing a framework to implement the unbundling requirements of section 251(d)(2). In this Order, we create rules for UNEs based on our new impairment standard and marketplace developments over the past three years. We are cognizant of the concern expressed by the court in *USTA* that our prior rules were not narrowly-tailored enough. We recognize that competition has evolved at a different pace in different geographic markets and for different market segments. Thus, to ensure that the proper degree of unbundling occurs, we rely, in certain instances when such analysis is necessary, on market-by-market fact-finding determinations made by the states. While we delegate to the states a role in the implementation of our federal unbundling requirements for certain network elements that require this more granular approach, we make clear that any action taken

by the states pursuant to this delegated authority must be in conformance with the Act and the regulations we set forth herein. We find further that the 1996 Act preserved the states authority to prescribe access obligations pursuant to state law in section 251(d)(3), but only to the extent that state laws or regulations do not conflict with or frustrate the Act and its purposes or substantially prevent the federal implementation regime. In short, the statute allows states to continue to exercise federal authority delegated by this Commission or state authority that is consistent with and does not substantially prevent implementation of the federal regime.

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189. We find that a delegation to the states with standards from the Commission will best ensure that our unbundling decisions are implemented consistently with the Act's purposes. We find this approach is consistent with the Supreme Court's view that the state commissions' participation in the "new federal regime" should be "guided by federal-agency regulations." We limit the states' delegated authority to the specific areas and network elements identified in this Order. To ensure that the states implement their delegated authority in the same carefully targeted manner as our federal determinations, we set forth in this Order federal guidelines to be applied by the states in the execution of their authority pursuant to federal law.

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192. We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3)

in the 1996 Act. We likewise do not agree with those that argue that the states may impose any unbundling framework they deem proper under state law, without regard to the federal regime. These commenters overlook the specific restraints on state action taken pursuant to state law embodied in section 251(d)(3), and the general restraints on state actions found in sections 261(b) and (c) of the Act. Their arguments similarly ignore long-standing federal preemption principles that establish a federal agency's authority to preclude state action if the agency, in adopting its federal policy, determines that state actions would thwart that policy. Under these principles, states would be precluded from enacting or maintaining a regulation or law pursuant to state authority that thwarts or frustrates the federal regime adopted in this Order.

193. Based on the plain language of the statute, we conclude that the state authority preserved by section 251(d)(3) is limited to state unbundling actions that are consistent with the requirements of section 251 *and* do not "substantially prevent" the implementation of the federal regulatory regime. We disagree with those commenters that maintain that, because we have permitted states to add UNEs to our national list in the past, we cannot limit their ability to continue to do so. Their argument ignores the clear directives Congress provided in the 1996 Act. Section 251(d)(3) preserves states' authority to impose unbundling obligations but only if their action is consistent with the Act and does not substantially prevent the implementation of our federal regime. Their argument also ignores the fact that prior Commission actions clearly had preemptive effect; as noted above, in the *UNE Remand Order*, the Commission prohibited the states from removing UNEs from the federally mandated list.

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195. Parties that believe that a particular state unbundling obligation is inconsistent with the limits of section 251(d)(3)(B) and (C) may seek a declaratory ruling from this Commission. If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(C). Similarly, we recognize that in at least some instances existing state requirements will not be consistent with our new framework and may frustrate its implementation. It will be necessary in those instances for the subject states to amend their rules and to alter their decisions to conform to our rules.

196. We find that our federal framework, which provides for uniform national rules for some network elements and a more granular approach for others, offers the certainty and stability necessary to enable parties to make investment decisions. This approach is required under *USTA*. Commenters have argued that nothing could create more instability, and be more destructive of investment incentives for both incumbent LECs and competitive LECs, than the establishment of multiple, separate state decisions as to which UNEs have to be offered and under what conditions. In this Order we have balanced the need for a more granular analysis with the need for certainty through a federal unbundling regime. In light of policy reasons and the fact that the D.C. Circuit has found fault

with our uniform national rules, we find that the availability of certain network elements may vary between geographic regions. However, the basis on which those more granular determinations will be made is straightforward and predictable. Additionally, we find that the limitations embodied in section 251(d)(3)(B) and (C) will prevent states from taking actions under state law that conflict with our framework and create disincentives for investment.

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222. The record indicates that deployment of alternative local loop facilities for the purposes of providing telecommunications services to the mass market has been minimal. The record also indicates, however, that there is evidence that other types of network facilities deployed primarily for other purposes (*e.g.*, cable television systems, satellite technologies) can and are increasingly being modified to support the delivery of narrowband and broadband services, particularly telephony and high-speed Internet access services, to the mass market. As a general matter, while these systems are increasingly being used for the delivery of retail narrowband and broadband services (*e.g.*, telephony and high-speed Internet access services), the record indicates that such systems are not being used currently to provide wholesale local loop offerings that might substitute for access to incumbent LECs' loop facilities.

223. The factual record consists of three parts. First, several parties submitted detailed studies describing local loop deployment and conditions surrounding competitive access to local loops. Second, many parties described their network operations, experiences, and future deployment

plans in comments and *ex parte* letters. Finally, the Commission staff has published reports arising from its monitoring of the deployment of advanced telecommunications capability and the development of local competition throughout the country.

224. Relying on these sources, the record shows that incumbent LECs continue to control the vast majority of voice-grade local loops throughout the nation. The Commission staff's recent *Local Telephone Competition December 2002 Report* noted that incumbent LECs served approximately 167.5 million switched access lines, or approximately 88.6 percent of the national market. The record reflects a significant growth in the amount of fiber incumbent LECs are deploying in the local loop, with most of this deployment occurring in the feeder plant rather than the distribution plant. According to some estimates, upwards of 30 percent of incumbent LEC access lines are now supported by the use of mixed fiber-copper loop facilities.

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228. The record presents some evidence that intermodal platforms increasingly support the provision of narrowband and broadband services to the mass market. In particular, the record indicates that cable and wireless technologies are currently being used, and will likely increasingly be used, to provide loop substitutes to support services that compete with incumbent local services.

229. Cable companies have widely deployed local broadband service in the form of high-speed Internet access offered via cable modem service. As of June 2002, cable companies provided more than 9.1 million high speed lines for Internet access to consumers nationwide and the

service is available to more than 70 million homes in the nation. Some cable companies also have augmented their networks to enable the provision of two-way voice telephony services. For such services, the cable infrastructure serves as a replacement for loops. At this time, however, deployment of voice telephony by cable companies has been substantially exceeded by the deployment of cable modem service. In their *UNE Fact Report*, the BOCs note that 1.5 million homes subscribe to cable telephony on a nationwide basis. The record indicates that circuit-switched cable telephony has been deployed in portions of 20 states and is now available to about 10 million households in the United States, or about 9.6 percent of the total households in the nation. Because companies originally deployed cable television systems for the provision of a one-way mass media service, retrofitting cable infrastructure to support cable telephony and broadband services requires substantial investment and modification. For those cable operators that have not already augmented their networks to offer cable telephony, which encompasses the majority of the cable networks currently in operation, significant technical and operational issues must still be resolved. Thus, it is difficult to predict at what point cable telephony will be deployed on a more widespread and ubiquitous basis. In addition, the record reflects that a number of cable operators are delaying their deployment of voice telephony until they are able to deploy such services over a packet-switched platform.

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234. We engage in a balancing test in determining our unbundling requirements for mass market local loops. We recognize, of course, that impairment remains our statutory touchstone. We do not rely exclusively, however, on an

impairment analysis to make our unbundling determination. We retain the flexibility under our section 251(d)(2) "at a minimum" authority to consider other factors. We use this flexibility sparingly. However, we believe that the goal of swift and ubiquitous broadband deployment is so important to the United States that we consider the statutory goals outlined in section 706 and how they relate to broadband as additional factors when considering loops. In addition, we also consider the comparative weight of the costs versus benefits of unbundling and the effect of intermodal competition. As explained below, based on our analysis of impairment and evaluation of other factors, we adopt loop unbundling rules for the mass market that ensure competitive access through extensive unbundling of the legacy copper loop facilities while promoting incentives to invest in next-generation network facilities and equipment through more limited unbundling of fiber-based loop facilities.

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245. *Intermodal Competition.* Upon review of the extensive record on intermodal competition compiled in this proceeding, we determine that, although the existence of intermodal loops does not warrant a finding of no impairment, such competition is a factor to consider in establishing our unbundling requirements. We have discussed the competitive characteristics of intermodal loops in preceding paragraphs. Indeed, the broadband competition posed by cable operators in the mass market supports our decision to refrain from unbundling requirements on the features, functions, and capabilities of certain types of loops. Similarly, the state of intermodal competition, including competition from wireless telephony, in the mass market for narrowband services supports our approach to

unbundling the legacy loops of incumbent LECs. Neither wireless nor cable has blossomed into a full substitute for wireline telephony. In addition, because wireless does not yet demonstrate the technical characteristics necessary to provide broadband services, unbundling incumbent LEC legacy loops is necessary for mass market consumers to realize the benefits of competition both for narrowband and broadband services, as well as both combined as a bundle.

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248. *Stand-Alone Copper Loops.* As discussed above, we find that requesting carriers are generally impaired on a national basis without unbundled access to an incumbent LEC's local loops, whether they seek to provide narrowband or broadband services, or both. However, we determine that unbundled access to conditioned, stand-alone copper loops (which, of course, may be shared between two competitive LECs as discussed below) is sufficient to overcome such impairment for the provision of broadband services. Consequently, we find that, subject to the grandfather provision and transition period explained below, incumbent LECs do not have to unbundle the HFPL for requesting telecommunications carriers.

249. With more than 6 million kilometers of copper cable deployed, it is clear that copper remains the predominant loop type serving the mass market and no party seriously asserts that stand-alone copper loops should not be unbundled in order to provide services to the mass market. To address the impairment discussed above, we conclude that incumbent LECs must provide unbundled access to local loops comprised of copper wire. That is, incumbent LECs shall provide, as a UNE, access to the complete

transmission path comprised of a copper local loop between the central office and the customer's premises. The copper loop network element is a single local loop, including all intermediate devices (*e.g.*, repeaters, load coils) used to establish the transmission path. Consistent with the definition the Commission adopted in the *UNE Remand Order*, this complete transmission path between the incumbent LEC's main distribution frame (or its equivalent) in its central office and the demarcation point at the customer's premises also includes the features, functions, and capabilities of the copper loop. We include within this network element all local loops comprised of copper cable, including two- and four-wire analog voice-grade loops, digital loops (*e.g.*, DS0s and ISDN lines) and two- and four-wire loops conditioned to transmit the digital signals needed to provide xDSL service. Consistent with their obligation to provide unbundled local loops on just, reasonable, and nondiscriminatory terms and conditions, incumbent LECs must provide the requesting carriers with nondiscriminatory access to the same detailed information about the loop that is available to the incumbent LEC in the same time intervals it is provided to the incumbent LEC's retail operations. We note that our requirements for stand-alone copper loops apply to both copper loops that are in active service and those that are deployed in the network as spares.

250. The practical effect of this unbundling requirement is to ensure that requesting carriers have access to the copper transmission facilities they need in order to provide narrowband or broadband services (or both) to customers served by copper local loops. We understand that this unbundling obligation may require an incumbent LEC to provide the functionality available in certain equipment,

as well as to remove the functionality from other equipment (*i.e.*, to condition the loop), in order to provide a complete transmission path between its main distribution frame (or equivalent) and the demarcation point at the customer's premises. As noted elsewhere in this Order, we find that line conditioning constitutes a form of routine network modification that must be performed at the competitive carrier's request to ensure that a copper local loop is suitable for providing xDSL service.

251. *Line Splitting.* We find that when competitive carriers opt to take an unbundled stand-alone loop, the incumbent LEC must provide the requesting carrier with the ability to engage in line splitting arrangements. We use the term "line splitting" to describe the scenario where one competitive LEC provides narrowband voice service over the low frequency of a loop and a second competitive LEC provides xDSL service over the high frequency portion of that same loop. The Commission previously found that existing rules require incumbent LECs to permit competing carriers to engage in line splitting where a competing carrier purchases the whole loop and provides its own splitter to be collocated in the central office. We reaffirm those requirements but, for purposes of clarity and ensuring regulatory certainty, we find that it is appropriate to adopt line splitting-specific rules.

252. Included among these rules is the requirement that incumbent LECs modify their OSS in such a manner as to facilitate line splitting. We also readopt the Commission rules requiring incumbent LECs to provide access to physical loop test access points on a nondiscriminatory basis for the purpose of loop testing, maintenance, and repair activities, and allowing incumbent LECs to maintain control over the loop and splitter equipment and

functions in certain circumstances. We do not anticipate that the incumbent LECs will have any difficulty implementing such an obligation because the Commission required as much from them in its *Line Sharing Reconsideration Order*. Furthermore, so long as the unbundled loop-switch combination is permitted in a particular state, the rules make clear that incumbent LECs must permit competitive LECs providing voice service through that arrangement to line split with another competitive LEC. As the Commission did before, we encourage incumbent LECs and competitors to use existing state commission collaboratives and change management processes to address OSS modifications that are necessary to support line splitting.

253. *Unbundled Access to Copper Subloops.* We require incumbent LECs to provide unbundled access to their copper subloops, *i.e.*, the distribution plant consisting of the copper transmission facility between a remote terminal and the customer's premises. We conclude that our impairment finding extends to copper subloops because they are part and parcel of the local loop plant of incumbent LECs – requesting carriers face precisely the same barriers to entry for a subloop as with a copper loop that extends from the incumbent LEC's central office to the customer's premises. Indeed, we note that several incumbent LECs argue that accessing copper subloops provides competitive LECs with sufficient access to the loop for the provision of the services that they seek to provide. Consistent with our section 706 goal to spur deployment of advanced telecommunications capability, we do not require incumbent LECs to provide access to their fiber feeder loop plant on an unbundled basis as a subloop UNE. As explained below, in light of our decision to refrain from

unbundling the packetized capabilities of incumbent LECs, incumbent LECs will provide access to their fiber feeder plant only to the extent their fiber feeder plant is necessary to provide a complete transmission path between the central office and the customer premises when incumbent LECs provide unbundled access to the TDM-based capabilities of their hybrid loops. We encourage parties to negotiate access arrangements that would facilitate competitive LEC access to copper subloops. Specifically, we expect that incumbent LECs will develop wholesale service offerings for access to their fiber feeder to ensure that competitive LECs have access to copper subloops. Of course, the terms and conditions of such access would be subject to sections 201 and 202 of the Act.

254. We define the copper subloop UNE as the distribution portion of the copper loop that is technically feasible to access at terminals in the incumbent LEC's outside plant (*i.e.*, outside its central offices), including inside wire. We find that any point on the loop where technicians can access the cable without removing a splice case constitutes an accessible terminal. As HTBC points out, a non-exhaustive list of these points includes the pole or pedestal, the serving area interface (SAI), the NID itself, the MPOE, the remote terminal, and the feeder/distribution interface. To facilitate competitive LEC access to the copper subloop UNE, we require incumbent LECs to provide, upon a site-specific request, access to the copper subloop at a splice near their remote terminals. With respect to the copper subloop, in addition to providing greater specificity of access points consistent with the HTBC proposal, we readopt our previous requirements for providing unbundled access to subloop UNEs. Unlike our previous subloop unbundling rules, however, the rules we

adopt herein do not require incumbent LECs to provide unbundled access to their feeder loop plant as stand-alone UNEs, thereby limiting incumbent LEC subloop unbundling obligations to their distribution loop plant.

255. *High Frequency Portion of the Loop.* Although we make the whole copper loop and the copper subloop available to requesting carriers as UNEs, along with the ability to engage in line splitting, some parties have requested that we also make available the high frequency portion of the copper loop. For reasons we discuss below, we decline to do so except as specified on a grandfathered basis. As an initial matter, we use the term "line sharing" to describe when a competing carrier provides xDSL service over the same line that the incumbent LEC uses to provide voice service to a particular end user, with the incumbent LEC using the low frequency portion of the loop and the competing carrier using the HFPL. Continued access to the incumbent LEC's conditioned, stand-alone copper loops and subloops enables a requesting carrier to offer and recover its costs from all of the services that the loop supports, including xDSL service. Commenters have not argued that it is technically infeasible to provide xDSL service over a stand-alone copper loop nor have they argued that it is technically infeasible to provide xDSL service over a line split loop (*i.e.*, a loop that is shared by two competitive LECs – one offering voice service and the second offering xDSL service). Advocates for reinstating unbundled access to the HFPL instead offer various economic and operational reasons for why they would be impaired without such access, generally reiterating the same reasons that were offered in the Commission's original line sharing proceeding in 1999.

256. As we noted above, the D.C. Circuit vacated these rules and directed the Commission to apply some limiting standard rationally related to the goals of the Act. The D.C. Circuit stated that the Commission must weigh the costs associated with unbundling in making its section 251(d)(2) determinations. More generally, the D.C. Circuit explained that the Commission must make an effort to balance these costs against the benefits of unbundling. It is against this backdrop that the Commission makes its decision on line sharing.

257. In its *Line Sharing Order*, the Commission found that competitive LECs were impaired without unbundled access to the HFPL because, among other things, purchasing a stand-alone loop would be too costly for carriers seeking to offer only broadband service. It also determined that requiring these carriers to offer voice service in order to provide xDSL service would impose on them the cost of providing circuit-switched voice services, which includes the development of marketing, billing, and customer care infrastructure to serve the needs of voice customers. In addition, the Commission found no evidence that requesting carriers could obtain the HFPL from another competitive LEC (*i.e.*, what the Commission subsequently termed "line splitting").

258. As an initial matter, we disagree with the Commission's prior finding that competitive LECs are impaired without unbundled access to the HPFL because purchasing a stand-alone loop would be too costly for carriers seeking to offer a broadband service. Whereas in the *Line Sharing Order*, the focus was only on the revenues derived from an individual service, our focus is on the all potential revenues derived from using the full functionality of the loop. As stated above, the impairment standard we adopt

today considers whether *all* potential revenues from entering a market exceed the costs of entry, taking into account consideration of any advantages a new entrant may have. Thus, in the instant case, we take into the account the fact that there are a number of services that can be provided over the stand-alone loop, including voice, voice over xDSL (i.e., VoDSL), data, and video services. In so doing, we conclude that the increased operational and economic costs of a stand-alone loop (including costs associated with the development of marketing, billing, and customer care infrastructure) are offset by the increased revenue opportunities afforded by the whole loop.

259. Moreover, we can no longer find that competitive LECs are unable to obtain the HFPL from other competitive LECs through line splitting. For example, the largest non-incumbent LEC provider of xDSL service, Covad, recently announced plans to offer ADSL service to "more of AT&T's 50 million consumer customers" through line splitting. In addition, in the 1999 *Line Sharing Order*, the Commission relied on the marketplace conditions present at the time to justify, at least partially, its decision to unbundle the HFPL. Specifically, the Commission noted the nascency of local competition and the lack of viable alternatives for a provider of broadband services. Although we recognize that these circumstances have not been completely reversed, significant strides have been made by competitors in the local market. Competitors now serve more than three times the number of voice customers that were served in 1999. Moreover, the conditions for further competitive entry are much better established as evidenced by the Commission's approval of 43 section 271 applications, which requires the Commission to find that the local telephone market is open to competition in a

particular state, since 1999. Since some incumbent LECs have thus far refused to provide xDSL service to customers that obtain voice service from a competitive LEC, by necessity, any of the over 11 million voice customers served by competitive LECs who seek xDSL service would have to obtain that service from a competing carrier.

260. We find that allowing competitive LECs unbundled access to the whole loop and to line splitting but not requiring the HFPL to be separately unbundled creates better competitive incentives than the alternatives. This is largely due to the difficulties in pricing the HFPL as a separate element. As we explained in the *Line Sharing Order*, the same physical loop is used for multiple services, and there is no single correct method for allocating loop costs among these services and the HFPL. Pricing the HFPL thus creates a dilemma: either incumbent LECs are allowed to over-recover their loop costs by fully charging for both the HFPL and the low frequency portion of the loop, or competitive LECs are allowed to purchase the HFPL at a price of roughly zero. Following our pricing rules, most states did the latter. The result is that competitive LECs purchasing only the HFPL have an irrational cost advantage over competitive LECs purchasing the whole loop and over the incumbent LECs. In contrast, allowing competitive LECs unbundled access to the whole loop and to line splitting but not requiring the HFPL to be separately unbundled puts competitive LECs using only the HFPL in a more fair competitive position with respect to other competitive LECs and to the incumbent LECs. Each carrier faces the same loop costs and, it if wishes, each can partner with another carrier to provide service over the HFPL alone or the low frequency portion of the loop alone as it wishes.

261. We expressly reject the Commission's earlier finding that "line sharing will level the competitive playing field. . . ." In fact, rules requiring line sharing may skew competitive LECs' incentives toward providing a broadband-only service to mass market consumers, rather than a voice-only service or, perhaps more importantly, a bundled voice and xDSL service offering. In addition, readopting our line sharing rules on a permanent basis would likely discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs' and the competitive LECs' offerings. We find that such results would run counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets.

262. Furthermore, in vacating the Commission's line sharing rules, the D.C. Circuit found that the Commission failed to consider the relevance of broadband competition coming from cable and, to a lesser extent, satellite providers. The Commission staff's *High Speed Services December 2002 Report* shows that, nationally, cable modem service is the most widely used means by which the mass market obtains broadband service. Indeed, two reports show that the gap between cable modem and ADSL subscribership continues to widen.

263. As discussed earlier, the Commission also has acknowledged the important broadband potential of other platforms and technologies, such as third generation wireless, satellite, and power lines. Although cable modem's lead in broadband deployment is not dispositive in our impairment analysis, the fact that broadband service is actually available through another network platform and may potentially be available through additional

platforms helps alleviate any concern that competition in the broadband market may be heavily dependent upon unbundled access to the HFPL. Indeed, as noted by Allegiance, the existence of some measure of intermodal alternatives in the residential market lessens the benefits of unbundling. Given that the whole loop is available, on an unbundled basis, we find that the costs of unbundling the HFPL outweigh the benefits when taking into account the skewed entry incentives discussed above. Moreover, we anticipate that the Commission's decisions in this Order and other proceedings will encourage the deployment of new technologies providing the mass market with even more broadband options.

264. *Line Sharing Transition.* We recognize that a number of competitive LECs have relied on the existence of line sharing to provide broadband service to end users since the adoption of the *Line Sharing Order.* These carriers have built internal systems to order the HFPL from incumbent LECs and have designed products that depend on line sharing as an input. In order to ensure that these carriers have adequate time to implement new internal processes and procedures, design new product offerings, and negotiate new arrangements with incumbent LECs to replace line sharing, we adopt a three-year transition period for new line sharing arrangements of requesting carriers. In addition, until the next biennial review, a proceeding that will commence in 2004, we grandfather all existing line sharing arrangements unless the respective competitive LEC, or its successor or assign, discontinues providing xDSL service to that particular end-user customer. During this interim period, we direct incumbent LECs to charge competitive LECs the same price for access to the HFPL for those grandfathered

customers that they charged prior to the effective date of this Order. Consistent with our stated policy goal of preventing harm to consumers caused by a discontinuance of service, we conclude that establishing a grandfathering rule is necessary to prevent consumers who currently rely on line sharing from losing their broadband service. This interim grandfathering rule will help alleviate the impact of such a significant rule change on end-user customers. Consistent with our findings set forth above in Part V.E, if a decision taken pursuant to state law after this Order becomes effective were to require line sharing obligations, any party that believes such decision is inconsistent with the limits of section 251(d)(3)(B) and (C) may seek a declaratory ruling from this Commission.

265. The three-year transition period for new line sharing arrangements will work as follows. During the first year, which begins on the effective date of this Order, competitive LECs may continue to obtain new line sharing customers through the use of the HFPL at 25 percent of the state-approved recurring rates or the agreed-upon recurring rates in existing interconnection agreements for stand-alone copper loops for that particular location. During the second year, the recurring charge for such access for those customers will increase to 50 percent of the state-approved recurring rate or the agreed-upon recurring rate in existing interconnection agreements for a stand-alone copper loop for that particular location. Finally, in the last year of the transition period, the competitive LECs' recurring charge for access to the HFPL for those customers obtained during the first year after release of this Order will increase to 75 percent of the state-approved recurring rate or the agreed-upon recurring rate for a stand-alone loop for that location. After the

transition period, any new customer must be served through a line splitting arrangement, through use of the stand-alone copper loop, or through an arrangement that a competitive LEC has negotiated with the incumbent LEC to replace line sharing. We strongly encourage the parties to commence negotiations as soon as possible so that a long-term arrangement is reached and reliance on the shorter-term default mechanism that we describe above is unnecessary.

266. The purpose of this transition is to minimize disruption to the customers that obtain xDSL service through line shared loops and to provide a reasonable glide path to competitive LECs currently availing themselves of this UNE. The Commission has established transition periods of this length in the past. For example, in establishing a three-year interim intercarrier compensation regime for ISP-bound traffic, the Commission stated that it would be "prudent to avoid a 'flash cut' to a new compensation regime that would upset the legitimate business expectations of carriers and their customers." We find that a similar approach is required here. It is entirely appropriate to fashion a transition period of sufficient length to enable competitive LECs to move their customers to alternative arrangements and modify their business practices and operations going forward.

267. As one commenter noted in describing the Commission's authority to establish interim rates for unbundled local circuit switching, in combination with other elements, inherent in the Commission's authority to establish transitional rules is its authority to establish transitional rates. Section 201(b) gives the Commission broad authority to adopt the transition mechanism set forth in this Part and nothing in that provision limits our authority with

respect to rates. Indeed, we agree with those commenters that contend that a transitional rate is often the most effective means by which to implement a "glide path from one regulatory/pricing regime to another." The incremental approach we adopt here will encourage requesting carriers either to migrate their customers to the whole loop in an orderly manner or to reach agreement, if it is desired, with the incumbent LEC to continue access to the HFPL on different terms and conditions.

268. In order to implement the line sharing transition plan described above, we find that it is necessary to reinstate certain rules concerning the HFPL. Specifically, we define the HFPL as the frequency range above the voiceband on a copper loop facility that is being used to carry analog circuit-switched voiceband transmissions. The features, functions, and capabilities of the HFPL network element are those that establish a complete transmission path on the frequency range above the one used to carry analog circuit-switched voice transmissions between the incumbent LEC's distribution frame (or its equivalent) in its central office and the demarcation point at the customer's premises, and includes any inside wire owned by the incumbent LEC. Incumbent LECs must condition loops to enable requesting carriers to access the HFPL. Finally, incumbent LECs must provide physical loop test access points on a nondiscriminatory basis for the purposes of loop testing, maintenance, and repair activities.

269. In addition, incumbent LECs are only required to provide access to the HFPL if the incumbent LEC is providing, and continues to provide, analog circuit-switched voiceband services on the particular loop over which the requesting carriers seeks access to provide ADSL service. In the event that the customer ceases

purchasing voice service from the incumbent LEC, either the new voice provider or the xDSL provider, or both, must purchase the full stand-alone loop to continue providing xDSL service. Finally, as the Commission found before, incumbent LECs may also maintain control over the loop and splitter equipment and functions.

270. *Low Frequency Portion of the Loop.* We disagree with CompTel that we should separately unbundle the low frequency portion of the loop, which is the portion of the copper local loop used to transmit voice signals. We conclude that unbundling the low frequency portion of the loop is not necessary to address the impairment faced by requesting carriers because we continue (through our line splitting rules) to permit a narrowband service-only competitive LEC to take full advantage of an unbundled loop's capabilities by partnering with a second competitive LEC that will offer xDSL service.

271. *Retirement of Copper Loops and Copper Subloops.* As we note below in our discussion of FTTH loops, we decline to prohibit incumbent LECs from retiring copper loops or copper subloops that they have replaced with fiber. Instead, we reiterate that our section 251(c)(5) network modification disclosure requirements (with the minor modifications also noted below in that same discussion) apply to the retirement of copper loops and copper subloops. In addition, any state requirements that currently apply to an incumbent LEC's copper loop or copper subloop retirement practices will continue to apply.

. . .

286. In making our unbundling determination for hybrid loops, we consider both impairment and, through our section 251(d)(2) "at a minimum" authority, additional

factors. As noted above, we find that competitive LECs are impaired on a national basis without unbundled access to a transmission path when seeking to provide service to the mass market. We further find that this impairment at least partially diminishes with the increasing deployment of fiber. In addition, we retain the flexibility to determine the unbundling approach that best addresses the impairment in a manner that advances other goals of the Act. In this regard, balanced against impairment, we evaluate three primary factors to determine the most appropriate unbundling requirements for hybrid loops. First, we consider the costs of unbundling, *i.e.*, whether refraining from unbundling requirements will stimulate facilities-based investment and promote the deployment of advanced telecommunications infrastructure. Second, we consider the effect of alternatives to mandating unbundled access to the hybrid loops of incumbent LECs. In particular, we consider whether unbundled access to subloops, spare copper loops, and the non-packetized portion of incumbent LEC hybrid loops, as well as remote terminal collocation, offer suitable alternatives to an intrusive unbundling approach. Finally, we consider the state of intermodal competition in crafting our unbundling approach. As explained further below, after balancing these three primary factors against our impairment findings, we adopt a national approach that relieves incumbent LECs of unbundling requirements for the next-generation network capabilities of their hybrid loops, while at the same time ensures requesting carriers have access to the transmission facilities they need to serve the mass market.

. . .

656. *Prices, Terms and Conditions.* It is a different question, however, as to what pricing standard applies to

network elements that are unbundled by BOCs solely because of the requirements set forth in section 271. Where there is no impairment under section 251 and a network element is no longer subject to unbundling, we look to section 271 and elsewhere in the Act to determine the proper standard for evaluating the terms, conditions, and pricing under which a BOC must provide the checklist network elements. Contrary to the claims of some commenters, TELRIC pricing for checklist network elements that have been removed from the list of section 251 UNEs is neither mandated by statute nor necessary to protect the public interest. Rather, Congress established a pricing standard under section 252 for network elements unbundled pursuant to section 251 *where impairment is found to exist*. Here, however, we are discussing the appropriate pricing standard for these network elements where there is no impairment. Under the no impairment scenario, section 271 requires these elements to be unbundled, but not using the statutorily mandated rate under section 252. As set forth below, we find that the appropriate inquiry for network elements required only under section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202.

657. By their own terms, neither section 252(d)(1) nor section 271(c)(2)(B) requires that the section 252(d)(1) pricing standard be applied to checklist network elements. Section 252(d)(1) provides the pricing standard "for network elements for purposes of [section 251(c)(3)]," and does not, by its terms, apply to network elements that are required only under section 271. Indeed, section 252(d)(1) is quite specific that it only applies for the purposes of implementation of section 251(c)(3) – meaning only where

there has been a finding of impairment with regard to a given network element. Moreover, as noted above, while checklist item 2 provides that a BOC must provide access to UNEs "in accordance with the requirements of sections 251(c)(3) and 252(d)(1)," the checklist items establishing the specific, separate network element obligations do not contain this language. We disagree with Z-Tel's argument that the cross-reference in checklist item 2 should be read into the later checklist items, and is implicit in them. Reading this language into these provisions would change their plain meaning, and Z-Tel offers no indication that this is what Congress intended. Moreover, we reject Z-Tel's argument that the cross-references were omitted simply to conserve space or to avoid repetition. To the contrary, we find Congress' decision to omit cross-references particularly meaningful in this instance: half of the checklist items contain explicit cross-references to other statutory provisions, and it is reasonable to conclude that Congress would have inserted a cross-reference into items 4-6 and 10 had that been its intention.

658. We also decline to use section 271, as suggested by Z-Tel, to broaden the unbundling obligations of section 251. Z-Tel notes that section 251(d)(2) directs the Commission to consider "impair[ment]" "at a minimum" in determining which network elements must be unbundled, and thus argues that the Commission may require unbundling pursuant to section 251 and 252 even in the absence of an impairment finding. In analyzing section 252(d)(2) the D.C. Circuit in *USTA* determined that the "at a minimum" language potentially could justify the imposition of unbundling obligations under that provision even in the "absence" of impairment. However, the *USTA* decision contained key limitations to the exercise of such authority.

In order to apply the "at a minimum" language in the absence of impairment, the *USTA* court required that the Commission "point to something a bit more concrete than its belief in the beneficence of the widest unbundling possible." Were we to accept Z-Tel's argument, we would again impose a virtually unlimited standard to unbundling, based on little more than faith that more unbundling is better, regardless of context. Checklist items 4 through 6 and 10 do not require us to impose unbundling pursuant to section 251(d)(2). Rather, the checklist independently imposes unbundling obligations, but simply does so with less rigid accompanying conditions.

659. In interpreting section 271(c)(2)(B), we are guided by the familiar rule of statutory construction that, where possible, provisions of a statute should be read so as not to create a conflict. So if, for example, pursuant to section 251, competitive entrants are found not to be "impaired" without access to unbundled switching at TELRIC rates, the question becomes whether BOCs are required to provide unbundled switching at TELRIC rates pursuant to section 271(c)(2)(B)(vi). In order to read the provisions so as not to create a conflict, we conclude that section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251, but does not require TELRIC pricing. This interpretation allows us to reconcile the interrelated terms of the Act so that one provision (section 271) does not gratuitously reimpose the very same requirements that another provision (section 251) has eliminated.

660. We reject arguments by Z-Tel and certain other competitive LECs that the proper way to reconcile any such conflict is to find that our section 251 impairment determinations with respect to unbundled local loops,

switching and transport would apply only to non-BOC incumbent LECs. Z-Tel's argument posits that particular network elements enumerated in the section 271 checklist are the "core" elements, and thus concludes that while the standards in section 251 would still apply to all carriers as to any network elements not mentioned in the checklist, section 271 requirements (as construed by Z-Tel) would supercede section 251 standards as to the most critical network elements delineated by Congress. We think that this reading of the two provisions is illogical. BOCs control 85.9 percent of incumbent LEC local switched access lines. Of the remaining lines, 11.6 percent of the lines are served by certain rural telephone companies that section 251(f) expressly exempts from the unbundling obligations set forth in 251(c). So, under the Z-Tel interpretation of sections 251 and 271, Z-Tel would have section 251(c), which is arguably the most important market-opening provision of the Act, apply to a mere 2.5 percent of incumbent LEC lines on the issues and facilities that matter most to local competition. The section 271 checklist cannot be read to have such a broad effect – while it does set forth particular conditions Congress wished to impose on entry into the in-region interLATA market, Congress could not have intended the checklist to render section 251 itself superfluous.

661. Our recognition that pricing pursuant to section 252 does not apply to network elements that are not required to be unbundled is consistent with the Commission's general approach in the *UNE Remand Order*, and has been applied – apparently with no adverse effect – with respect to access to directory assistance and operator services. The Commission removed directory assistance and operator services from the list of UNEs in the *UNE*

Remand Order. These network elements, like loops, transport, switching and signaling databases, are separately listed in the competitive checklist. Accordingly, as explained in subsequent section 271 orders, access to directory assistance and operator services remains a condition of long distance entry – but the standard applicable to rates and conditions is not derived from sections 251 and 252. We note that no party has sought to overturn this aspect of the seventeen section 271 orders that have applied this analysis since directory assistance and operator services were removed from the list of section 251 UNEs, and no party has suggested in this proceeding that the Commission's interpretation of the statute has produced a perverse policy impact with respect to a BOC's provision of these network elements.

662. We note, however, that in the *UNE Remand Order* the Commission stated that "[i]f a checklist network element is unbundled, the applicable prices, terms and conditions are determined in accordance with sections 251 and 252. If a checklist network element does not satisfy the unbundling standards in section 251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance with sections 201(b) and 202(a)." We reach essentially the same result here, but we clarify our reasoning below.

663. The Supreme Court has held that the last sentence of section 201(b), which authorizes the Commission "to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act," empowers the Commission to adopt rules that implement the new provisions of the Communications Act that were added by the Telecommunications Act of 1996. Section 271 is such a provision. Thus, the pricing of

checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are reviewed utilizing the basic just, reasonable, and nondiscriminatory rate standard of sections 201 and 202 that is fundamental to common carrier regulation that has historically been applied under most federal and state statutes, including (for interstate services) the Communications Act. Application of the just and reasonable and nondiscriminatory pricing standard of sections 201 and 202 advances Congress's intent that Bell companies provide meaningful access to network elements.

664. Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that the Commission will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6). We note, however, that for a given purchasing carrier, a BOC might satisfy this standard by demonstrating that the rate for a section 271 network element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff, to the extent such analogues exist. Alternatively, a BOC might demonstrate that the rate at which it offers a section 271 network element is reasonable by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate.

Note 611. Z-Tel and Talk America argue that the Eighth Circuit has already found that section 251(d)(3) "constrains the FCC's authority" to preempt state access and interconnection obligations. Talk America Nov. 15, 2002 Role of States *Ex Parte* Letter at 2; Z-Tel Comments

at 87-88, citing *Iowa Utils. Bd. v. FCC,* 120 F.3d. at 806-07. Z-Tel maintains that, in light of the Eighth Circuit's holding, the Commission should not attempt, in advance, to limit the state commissions' authority to create unbundling requirements but should conduct a separate adjudicative proceeding if an incumbent LEC seeks to preempt state unbundling requirements. Z-Tel Comments at 89. The Eighth Circuit found that the scope of federal rulemaking authority under section 251 of the 1996 Act was limited to six specific areas and interpreted section 251(d)(3) as a further constraint on Commission authority. *Iowa Utils. Bd. v. FCC*, 120 F.3d at 806. The Supreme Court reversed with respect to the scope of federal rulemaking authority in *Iowa Utilities Board.* The Commission did not appeal the Eighth Circuit's holding with respect to section 251(d)(3). That portion of the Eighth Circuit's opinion reinforces the language of the section, *i.e.*, that state interconnection and access regulations must "substantially prevent" the implementation of the federal regime to be precluded and that "merely an inconsistency" between a state regulation and a Commission regulation was not sufficient for Commission preemption under section 251(d)(3). *Id.* We believe our decision properly balances the broad authority granted to the Commission by the 1996 Act with the role preserved for the states in section 251(d)(3) and is fully consistent with the Eighth Circuit's interpretation of that provision.

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Note 613. *Fidelity Federal Savings & Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 154 (1982) ("A pre-emptive regulation's force does not depend on express congressional authorization to displace state law"); *City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("The statutorily

authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof."). Even where Congress has preserved some role for the states the Supreme Court has found that "state law is nullified to the extent that it actually conflicts with federal law." *Fidelity Federal Savings & Loan Assoc. v. de la Cuesta,* 458 U.S. at 154. The Court stated that such a "conflict" arises " . . . when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)." *Id.*

Note 614. We find that Congress' reference to the "implementation of the requirements of this section" in section 251(d)(3)(C) means the Commission's section 251 implementing regulations. AT&T's argument that the validity of state unbundling regulations must be measured solely against the Act's purposes fails to recognize that the Commission is charged with implementing the Act and its purposes are fully consistent with the Act's purposes. *See* AT&T Nov. 13, 2002 *Ex Parte* Letter at 6; Letter from Mark Rosenblum, Vice President – Law, AT&T, to Michael K. Powell, Chairman, FCC, *et al.*, CC Docket No. 01-338 at 7, *in* Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 (filed Dec. 18, 2002) (AT&T Dec. 18, 2002 Rosenblum *Ex Parte* Letter).

APPENDIX C

Relevant Sections of the Telecommunications Act of 1996

* * *

47 U.S.C. § 152. Application of Act

(a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in [the Philippine Islands or] the Canal Zone, or to wire or radio communication or transmission wholly within [the Philippine Islands or] the Canal Zone. The provisions of this Act shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in title VI.

(b) Except as provided in sections 223 through 227, inclusive, and section 332, and subject to the provisions of section 301 and Title VI, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect

common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 through 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4).

* * *

47 U.S.C. § 160. Competition in provision of telecommunications service

(a) Regulatory flexibility. Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that –

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive effect to be weighed. In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

(c) Petition for forbearance. Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a). The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

(d) Limitation. Except as provided in section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) State enforcement after Commission forbearance. A State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying under subsection (a).

* * *

47 U.S.C. § 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: Provided, That communications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of

communications: Provided further, That nothing in this Act or in any other provision of law shall be construed to prevent a common carrier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: Provided further, That nothing in this Act or in any other provision of law shall prevent a common carrier subject to this Act from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.

* * *

47 U.S.C. § 202. Discriminations and preferences

(a) Charges, services, etc. It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services included. Charges or services, whenever referred to in this Act, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or

radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Penalty. Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $ 6,000 for each such offense and $ 300 for each and every day of the continuance of such offense.

* * *

47 U.S.C. § 251. Interconnection

(a) General duty of telecommunications carriers. Each telecommunications carrier has the duty –

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256.

(b) Obligations of all local exchange carriers. Each local exchange carrier has the following duties:

(1) Resale. The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability. The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity. The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone

numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way. The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.

(5) Reciprocal compensation. The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers. In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate. The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection. The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network –

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

(3) Unbundled access. The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale. The duty –

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service

that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes. The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation. The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation.

(1) In general. Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards. In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether –

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations. In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that –

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration.

(1) Commission authority and jurisdiction. The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs. The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications

carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number. The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on the date of enactment of the Wireless Communications and Public Safety Act of 1999.

(f) Exemptions, suspensions, and modifications.

(1) Exemption for certain rural telephone companies.

(A) Exemption. Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule. The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to

terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption. The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on the date of enactment of the Telecommunications Act of 1996.

(2) Suspensions and modifications for rural carriers. A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification –

(A) is necessary –

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements. On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such

restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier.

(1) Definition. For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that –

(A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and

(B) (i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations; or

(ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents. The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if –

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision. Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201.

* * *

47 U.S.C. § 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation.

(1) Voluntary negotiations. Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation. Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration.

(1) Arbitration. During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner.

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning –

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond. A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission.

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any

response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate. The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration. In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall –

(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards.

(1) Interconnection and network element charges. Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section –

(A) shall be –

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) May include a reasonable profit.

(2) Charges for transport and termination of traffic.

(A) In general. For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless –

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each

carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction. This paragraph shall not be construed –

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services. For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission.

(1) Approval required. Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall

approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection. The State commission may only reject –

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that –

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority. Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision. If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a), or within 30 days after submission by the parties of an agreement

adopted by arbitration under subsection (b), the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act. If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions. In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

(f) Statements of generally available terms.

(1) In general. A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 and the regulations thereunder and the standards applicable under this section.

(2) State commission review. A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 and the regulations thereunder. Except as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review. The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission –

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review. Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected. The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251.

(g) Consolidation of State proceedings. Where not inconsistent with the requirements of this Act, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253(e), and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this Act.

(h) Filing required. A State commission shall make a copy of each agreement approved under subsection (e) and each statement approved under subsection (f) available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers. A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition of incumbent local exchange carrier. For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h).

* * *

47 U.S.C. § 261. Effect on other requirements

(a) Commission regulations. Nothing in this part shall be construed to prohibit the Commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996 in fulfilling the requirements of this part, to the extent that such regulations are not inconsistent with the provisions of this part.

(b) Existing State regulations. Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.

(c) Additional State requirements. Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

* * *

47 U.S.C. § 271. Bell operating company entry into interLATA services

(a) General limitation. Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.

(b) InterLATA services to which this section applies.

(1) In-region services. A Bell operating company, or any affiliate of that Bell operating company, may provide

interLATA services originating in any of its in-region States (as defined in subsection (i)) if the Commission approves the application of such company for such State under subsection (d)(3).

(2) Out-of-region services. A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region States after the date of enactment of the Telecommunications Act of 1996, subject to subsection (j).

(3) Incidental interLATA services. A Bell operating company, or any affiliate of a Bell operating company, may provide incidental interLATA services (as defined in subsection (g)) originating in any State after the date of enactment of the Telecommunications Act of 1996.

(4) Termination. Nothing in this section prohibits a Bell operating company or any of its affiliates from providing termination for interLATA services, subject to subsection (j).

(c) Requirements for providing certain in-region interLATA services.

(1) Agreement or statement. A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.

(A) Presence of a facilities-based competitor. A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection

to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 3(47)(A), but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier. For the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services.

(B) Failure to request access. A Bell operating company meets the requirements of this subparagraph if, after 10 months after the date of enactment of the Telecommunications Act of 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1), and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f). For purposes of this subparagraph, a Bell operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section 252, or (ii) violated the terms of an agreement approved under section 252 by the provider's failure to comply, within a reasonable period

of time, with the implementation schedule contained in such agreement.

(2) Specific interconnection requirements.

(A) Agreement required. A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought –

(i) (I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A), or

(II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B), and

(ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph.

(B) Competitive checklist. Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:

(i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1).

(ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1).

(iii) Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224.

(iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

(v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

(vi) Local switching unbundled from transport, local loop transmission, or other services.

(vii) Nondiscriminatory access to –

(I) 911 and E911 services;

(II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and

(III) operator call completion services.

(viii) White pages directory listings for customers of the other carrier's telephone exchange service.

(ix) Until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers. After that date, compliance with such guidelines, plan, or rules.

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

(xi) Until the date by which the Commission issues regulations pursuant to section 251 to require

number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3).

(xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2).

(xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3).

(d) Administrative provisions.

(1) Application to Commission. On and after the date of enactment of the Telecommunications Act of 1996, a Bell operating company or its affiliate may apply to the Commission for authorization to provide interLATA services originating in any in-region State. The application shall identify each State for which the authorization is sought.

(2) Consultation.

(A) Consultation with the Attorney General. The Commission shall notify the Attorney General promptly of any application under paragraph (1). Before making any determination under this subsection, the Commission shall consult with the Attorney General, and if the Attorney General submits any comments in writing, such comments shall be included in the record of the

Commission's decision. In consulting with and submitting comments to the Commission under this paragraph, the Attorney General shall provide to the Commission an evaluation of the application using any standard the Attorney General considers appropriate. The Commission shall give substantial weight to the Attorney General's evaluation, but such evaluation shall not have any preclusive effect on any Commission decision under paragraph (3).

(B) Consultation with State commissions. Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c).

(3) Determination. Not later than 90 days after receiving an application under paragraph (1), the Commission shall issue a written determination approving or denying the authorization requested in the application for each State. The Commission shall not approve the authorization requested in an application submitted under paragraph (1) unless it finds that –

(A) the petitioning Bell operating company has met the requirements of subsection (c)(1) and –

(i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A), has fully implemented the competitive checklist in subsection (c)(2)(B); or

(ii) with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B), such statement offers all of the items

included in the competitive checklist in subsection (c)(2)(B);

(B) the requested authorization will be carried out in accordance with the requirements of section 272; and

(C) the requested authorization is consistent with the public interest, convenience, and necessity.

The Commission shall state the basis for its approval or denial of the application.

(4) Limitation on commission. The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B).

(5) Publication. Not later than 10 days after issuing a determination under paragraph (3), the Commission shall publish in the Federal Register a brief description of the determination.

(6) Enforcement of conditions.

(A) Commission authority. If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing –

(i) issue an order to such company to correct the deficiency;

(ii) impose a penalty on such company pursuant to title V; or

(iii) suspend or revoke such approval.

(B) Receipt and review of complaints. The Commission shall establish procedures for the review of complaints concerning failures by Bell operating companies to meet conditions required for approval under paragraph (3). Unless the parties otherwise agree, the Commission shall act on such complaint within 90 days.

(e) Limitations.

(1) Joint marketing of local and long distance services. Until a Bell operating company is authorized pursuant to subsection (d) to provide interLATA services in an in-region State, or until 36 months have passed since the date of enactment of the Telecommunications Act of 1996, whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) with interLATA services offered by that telecommunications carrier.

(2) IntraLATA toll dialing parity.

(A) Provision required. A Bell operating company granted authority to provide interLATA services under subsection (d) shall provide intraLATA toll dialing parity throughout that State coincident with its exercise of that authority.

(B) Limitation. Except for single-LATA States and States that have issued an order by December 19, 1995, requiring a Bell operating company to implement intraLATA toll dialing parity, a State may not require a Bell operating company to implement intraLATA toll dialing parity in that State before a Bell operating company has been granted authority under this section to

provide interLATA services originating in that State or before 3 years after the date of enactment of the Telecommunications Act of 1996, whichever is earlier. Nothing in this subparagraph precludes a State from issuing an order requiring intraLATA toll dialing parity in that State prior to either such date so long as such order does not take effect until after the earlier of either such dates.

(f) Exception for previously authorized activities. Neither subsection (a) nor section 273 shall prohibit a Bell operating company or affiliate from engaging, at any time after the date of enactment of the Telecommunications Act of 1996, in any activity to the extent authorized by, and subject to the terms and conditions contained in, an order entered by the United States District Court for the District of Columbia pursuant to section VII or VIII(C) of the AT&T Consent Decree if such order was entered on or before such date of enactment, to the extent such order is not reversed or vacated on appeal. Nothing in this subsection shall be construed to limit, or to impose terms or conditions on, an activity in which a Bell operating company is otherwise authorized to engage under any other provision of this section.

(g) "Incidental interLATA services" defined. For purposes of this section, the term "incidental interLATA services" means the interLATA provision by a Bell operating company or its affiliate –

(1) (A) of audio programming, video programming, or other programming services to subscribers to such services of such company or affiliate;

(B) of the capability for interaction by such subscribers to select or respond to such audio programming, video programming, or other programming services;

(C) to distributors of audio programming or video programming that such company or affiliate owns or controls, or is licensed by the copyright owner of such programming (or by an assignee of such owner) to distribute; or

(D) of alarm monitoring services;

(2) of two-way interactive video services or Internet services over dedicated facilities to or for elementary and secondary schools as defined in section 254(h)(5);

(3) of commercial mobile services in accordance with section 332(c) of this Act and with the regulations prescribed by the Commission pursuant to paragraph (8) of such section;

(4) of a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA;

(5) of signaling information used in connection with the provision of telephone exchange services or exchange access by a local exchange carrier; or

(6) of network control signaling information to, and receipt of such signaling information from, common carriers offering interLATA services at any location within the area in which such Bell operating company provides telephone exchange services or exchange access.

(h) Limitations. The provisions of subsection (g) are intended to be narrowly construed. The interLATA services provided under subparagraph (A), (B), or (C) of subsection (g)(1) are limited to those interLATA transmissions incidental to the provision by a Bell operating

company or its affiliate of video, audio, and other programming services that the company or its affiliate is engaged in providing to the public. The Commission shall ensure that the provision of services authorized under subsection (g) by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market.

(i) Additional definitions. As used in this section –

(1) In-region State. The term "in-region State" means a State in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before the date of enactment of the Telecommunications Act of 1996.

(2) Audio programming services. The term "audio programming services" means programming provided by, or generally considered to be comparable to programming provided by, a radio broadcast station.

(3) Video programming services; other programming services. The terms "video programming service" and "other programming services" have the same meanings as such terms have under section 602 of this Act.

(j) Certain service applications treated as in-region service applications. For purposes of this section, a Bell operating company application to provide 800 service, private line service, or their equivalents that –

(1) terminate in an in-region State of that Bell operating company, and

(2) allow the called party to determine the inter-LATA carrier, shall be considered an in-region service subject to the requirements of subsection (b)(1).

APPENDIX D

LIST OF ADDITIONAL PARTIES

The following is a list of the parties to the District of Columbia Circuit proceedings that are not listed in the caption of the decision below (Appendix A).

Allegiance Telecom, Inc.

Association for Local Telecommunications Services

AT&T Corp.

AT&T Wireless

BellSouth Corporation

Birch Telecom, Inc.

Bridgecom International Inc.

Catena Networks, Inc.

Cbeyond Communications, LLC

Conversent Communications LLC

Covad Communications Company

El Paso Networks LLC

Eschelon Telecommunications Inc.

Focal Communications Corporation

Information Technology Association of America

KMC Telecom Inc.

LDMI Telecommunications Inc.

McLeodUSA Telecommunications

Mpower Communications Corp.

National Association of Regulatory Utility Commissioners, joined by Intervenors, the Arizona

Corporation Commission and the Michigan Public Service Commission

National Association of State Utility Consumer Advocates

National Telecommunications Cooperative Association

Nextel Communications, Inc.

NuVox, Inc.

Pennsylvania Public Utility Commission

People of the State of California & Public Utilities Commission of California

People of the State of New York and the Public Service Commission of the State of New York

Promoting Active Competition Everywhere Coalition

Qwest Communications International Inc.

RCN Telecommunications Services Inc.

Sage Telecom

SBC Communications Inc.

SNiP LiNK

Talk America Inc.

TDS Metrocom, LLC

T-Mobile USA, Inc.

United States Telecom Association

Verisign Communication Services

Verizon Telephone Companies

WorldCom Inc.

Z-Tel Communications, Inc.

Supreme Court, U.S.
FILED
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(3) (4) (2)

Nos. 04-12, 04-15 and 04-18

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, ET AL., PETITIONERS

v.

UNITED STATES TELECOM ASSOCIATION, ET AL.

AT&T CORP., ET AL., PETITIONERS

v.

UNITED STATES TELECOM ASSOCIATION, ET AL.

CALIFORNIA, ET AL., PETITIONERS

v.

UNITED STATES TELECOM ASSOCIATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, seeks to bring competition to local telephone markets in part by requiring incumbent local exchange carriers (ILECs) to give competitors access to elements of the ILECs' networks "on an unbundled basis." 47 U.S.C. 251(c)(3). In determining what network elements an ILEC must make available to new entrants, the Federal Communications Commission is directed to consider, "at a minimum," whether the lack of access to a particular nonproprietary element would "impair" the ability of a new entrant to provide service. 47 U.S.C. 251(d)(2). The questions presented in this case are:

1. Whether the Commission reasonably determined under Section 251 not to require ILECs to unbundle certain loop facilities that allow the provision of broadband service.

2. Whether the court of appeals correctly determined, with respect to broadband and other network facilities that the Commission has not required to be unbundled under Section 251, that petitioners' contentions concerning preemption of state unbundling requirements are not ripe for judicial review.

3. Whether the court of appeals erred in vacating Commission rules requiring the unbundling, subject to state commission determinations, of mass-market switching and certain dedicated transport facilities under Section 251(c)(3).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	14
1. Broadband unbundling	14
2. Line sharing and preemption	17
3. Narrowband unbundling	24
Conclusion	27

TABLE OF AUTHORITIES

Cases:

AT&T Corp. v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999)	2, 3, 4, 5, 15, 19, 24, 26
Alascom, Inc. v. *FCC*, 727 F.2d 1212 (D.C. Cir. 1984)	20
Bartholdi Cable Co. v. *FCC*, 114 F.3d 274 (D.C. Cir. 1997)	19
Batterton v. *Francis*, 432 U.S. 416 (1977)	26
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)	26
City of New York v. *FCC*, 486 U.S. 57 (1988)	21
Coserv Limited Liability Corp. v. *Southwestern Bell Tel. Co.*, 350 F.3d 482 (5th Cir. 2003)	24
Fidelity Fed. Sav. & Loan Ass'n v. *De la Cuesta*, 458 U.S. 141 (1982)	21
Geier v. *American Honda Motor Co.*, 529 U.S. 861 (2000)	21
Glover v. *United States*, 531 U.S. 198 (2001)	19
Iowa Utils. Bd. v. *FCC*, 120 F.3d 753 (8th Cir. 1997), aff'd in part and rev'd in part *sub nom. AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999)	4

Cases—Continued: Page

National Park Hospitality Ass'n v. *Department of the Interior*, 538 U.S. 803 (2003) 20
Ohio Forestry Ass'n v. *Sierra Club*, 523 U.S. 726 (1998) 21
United States Telecom Ass'n v. *FCC*, 290 F.3d 415 (D.C. Cir. 2002), cert. denied, 538 U.S. 940 (2003) 6, 7, 8, 26
Verizon Communications Inc. v. *FCC*, 535 U.S. 467 (2002) 6, 17, 24, 26
Wisconsin Dep't of Health & Family Servs. v. *Blumer*, 534 U.S. 473 (2002) 26
WorldCom, Inc. v. *United States Telecom Ass'n*, cert. denied, 538 U.S. 940 (2003) 8, 26

Statutes and regulation:

Communications Act of 1934, 47 U.S.C. 151 *et seq.*:
47 U.S.C. 201 ..... 12, 22
47 U.S.C. 202 ..... 12, 22
47 U.S.C. 251 ..... 3, 11, 16, 20, 21, 22
47 U.S.C. 251(c) 2, 24
47 U.S.C. 251(c)(3) 3, 5, 9, 11, 22, 23, 26
47 U.S.C. 251(d)(1) 3, 12, 23
47 U.S.C. 251(d)(2) 3, 5, 13, 14, 15, 18, 21, 26
47 U.S.C. 251(d)(3) 11, 20, 21
47 U.S.C. 251(d)(3)(B) 21
47 U.S.C. 251(d)(3)(C) 11, 21, 22
47 U.S.C. 252 23
47 U.S.C. 252(c) 4
47 U.S.C. 252(c)(2) 23
47 U.S.C. 252(d) 23
47 U.S.C. 252(d)(1) 12, 22, 23
47 U.S.C. 271 ..... 12, 22, 23, 24
47 U.S.C. 271(d)(6) 23, 24
47 U.S.C. 405 19

Statutes and regulation—Continued: Page

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 2
§ 706, 110 Stat. 153 (47 U.S.C. 157 note) 17
47 C.F.R. 51.317(b)(1) 5

Miscellaneous:

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, In re, 11 F.C.C.R. 15,499 (1996) 4
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, In re, 15 F.C.C.R. 3696 (1999) 5
Order and Notice of Proposed Rulemaking, FCC No. 04-179 (Aug. 20, 2004) <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-179Al.pdf> ... 13, 14, 25

In the Supreme Court of the United States

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-65a[1]) is reported at 359 F.3d 554. The order of the Federal Communications Commission (Pet. App. 66a-1035a) is

[1] All references to the Pet. App. are to the appendix to the petition for a writ of certiorari in No. 04-15.

reported at 18 F.C.C.R. 16,978, as corrected by *Errata*, 18 F.C.C.R. 19,020.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2004. On May 24, 2004, the Chief Justice extended the time within which to file a petition for a writ of certiorari in No. 04-12 to and including June 30, 2004. On May 25, 2004, the Chief Justice extended the time within which to file a petition for a writ of certiorari in Nos. 04-15 and 04-18 to and including June 30, 2004, and all the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. With the passage of the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, Congress "ended the longstanding regime of state-sanctioned monopolies" in local telephone service. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999) (*AT&T*). The 1996 Act "fundamentally restructures local telephone markets" by imposing on incumbent local exchange carriers (ILECs) "a host of duties intended to facilitate market entry" by aspiring competitors. *Ibid.* The Act imposes on each ILEC an "obligation * * * to share its network with competitors" under the terms prescribed by 47 U.S.C. 251(c). *AT&T*, 525 U.S. at 371. Under Section 251(c), a competitive local exchange carrier (CLEC) may use the ILEC's network in three ways: "It can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the incumbent's network 'on an unbundled basis'; and it can interconnect its own facilities with the incumbent's network." *Ibid.*

The central network-sharing provision of the 1996 Act is Section 251(c)(3), which provides that a new entrant may "access" (*i.e.*, lease) "elements" of an incumbent's network on an "unbundled basis" under rates, terms, and conditions that are just, reasonable, and nondiscriminatory. 47 U.S.C. 251(c)(3). Examples of "network elements" include "the local loops (wires connecting telephones to switches), the switches (equipment directing calls to their destinations), and the transport trunks (wires carrying calls between switches) that constitute a local exchange network." *AT&T*, 525 U.S. at 371.

Congress required that the Federal Communications Commission was to complete the task of adopting regulations to implement the requirements of Section 251 within six months after enactment of the 1996 Act. 47 U.S.C. 251(d)(1). For purposes of "determining what network elements should be made available" under Section 251(c)(3), the 1996 Act directs the Commission to "consider, at a minimum, whether * * * access to such network elements as are proprietary in nature is *necessary*," and whether, as to non-proprietary elements, "the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. 251(d)(2) (emphasis added). The statute does not define or otherwise elaborate on the terms "necessary" and "impair." This case concerns only non-proprietary elements, and the "impair" standard is thus at issue.

Under procedures prescribed in the 1996 Act, the specific rights and duties of incumbents and competing carriers are set forth in "interconnection agreements." If an incumbent and a competing carrier are unable to reach a negotiated agreement, the 1996 Act provides

that the relevant state commission shall "arbitrate" all "open issues" between the parties by applying the "requirements of section 251 of the Act, including the regulations" adopted by the Federal Communications Commission. 47 U.S.C. 252(c).

2. a. In August 1996, the FCC adopted initial rules for implementing the local competition provisions of the 1996 Act. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499 (1996) (*Local Competition Order*). The FCC designated all components of the incumbents' networks as network elements and required incumbents to lease to their competitors preassembled combinations of some or all of those elements. It also required that rates for network elements be set under the FCC's "total element long-run incremental cost" (TELRIC) pricing standard. On petitions for review, the United States Court of Appeals for the Eighth Circuit affirmed some parts of the *Local Competition Order* and reversed others. *Iowa Utils. Bd.* v. *FCC*, 120 F.3d 753 (1997). On certiorari, this Court affirmed in part and reversed in part. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999).

The Court affirmed the FCC's general authority to adopt rules governing the States' participation in the administration of the 1996 Act, including rules establishing a methodology that the States would apply when setting the prices of unbundled network elements. *AT&T*, 525 U.S. at 377-385. The Court also affirmed several aspects of the FCC's unbundling rules, including various rules that allowed CLECs to "lease a complete, preassembled network" at cost-based rates. *Id.* at 392-395. At the same time, the Court held that the FCC had not adequately given effect to the "necessary" and "impair" standards in adopting its rules

governing unbundled access under Section 251(d)(2). *Id.* at 387-392. The Court held that the Commission had erroneously read Section 251(c)(3) as requiring incumbents to "provide all network elements for which it is technically feasible to provide access" and had treated Section 251(d)(2) as merely authorizing the FCC to "create isolated exemptions from some underlying duty to make all network elements available." *Id.* at 391 (citation omitted). The Court further held that the Commission had erred in refusing to consider "the availability [to new entrants] of elements outside the incumbent's network" and in treating any cost or quality difference—no matter how trivial—as conclusive evidence of impairment. *Id.* at 389-390. While acknowledging that the Commission was not bound to any particular interpretation of the terms of Section 251(d)(2), the Court held that "the Act requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act." *Id.* at 388.

Responding to this Court's decision in *AT&T*, the Commission revised its rules in 1999 to adopt a new interpretation of the statutory impairment standard. *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 F.C.C.R. 3696 (1999) (*Remand Order*). Under the revised interpretation, a competing carrier was deemed to be "impaired" with respect to a particular element if, "taking into consideration the availability of alternative elements outside the incumbent LEC's network * * *, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer." 47 C.F.R. 51.317(b)(1). Under that standard, the FCC removed some elements from the national list (directory and operator services, packet switching, and switching to serve certain large "enter-

prise" customers), but maintained access requirements that allowed competing carriers who do not have their own network facilities to obtain a combination of loops, transport, and switching that could be used to serve "mass market" (*i.e.*, residential and small business) customers. Numerous ILECs filed petitions for review in the D.C. Circuit challenging the FCC's revised unbundling rules.

b. While those petitions were pending, this Court rejected the ILECs' challenge to the FCC's TELRIC rules for pricing unbundled elements in *Verizon Communications Inc.* v. *FCC*, 535 U.S. 467 (2002). The Court in *Verizon* addressed claims that were central to the incumbents' simultaneous D.C. Circuit challenge to the scope of unbundling—*i.e.*, that making combinations of all unbundled elements available at TELRIC rates "may simulate the competition envisioned by the Act but does not induce it" and "perversely creates incentives against competition in fact." *Id.* at 503. This Court rejected those claims, finding that the evidence did not support the argument that TELRIC rates would "stifle" investment incentives, *id.* at 517 n.33, and concluding that, in any event, the statute gave the FCC discretion to choose "to induce [potential entrants] to compete in less capital-intensive facilities with lessened incentives to build their own bottleneck facilities." *Id.* at 510.

c. Shortly after this Court issued its *Verizon* decision addressing TELRIC pricing, the D.C. Circuit granted the ILECs' petitions for review of the FCC's 1999 *Remand Order*. *United States Telecom Ass'n* v. *FCC*, 290 F.3d 415 (2002) (*USTA I*), cert. denied, 538 U.S. 940 (2003). The court of appeals recognized "the extraordinary complexity of the Commission's task," and acknowledged that Congress "gave no detail as to

either the kind or degree of impairment" that would justify mandatory unbundling. *Id.* at 421-422. Nonetheless, the court of appeals remanded the Commission's rules for further consideration.

The D.C. Circuit determined that the Commission's network unbundling rules were impermissibly overbroad in three respects. First, the court of appeals took issue with the Commission's decision "to adopt a uniform national rule" requiring unbundling "without regard to the state of competitive impairment in any particular market." *USTA I*, 290 F.3d at 422. The court concluded that the Commission should have adopted "a more nuanced concept of impairment" that (among other things) accounted for the effects of any existing implicit universal service subsidies. *Id.* at 422-423. Second, although the court recognized that "any cognizable competitive 'impairment' would necessarily be traceable to some kind of disparity in cost" between obtaining an unbundled network element and obtaining a reasonable substitute for the element, it faulted the Commission for relying on cost disparities that may be "faced by virtually any new entrant in any sector of the economy, no matter how competitive the sector." *Id.* at 426. Lastly, the court of appeals set aside the Commission's decision to allow CLECs to lease the high-frequency portion of ILECs' copper loops to provide broadband service (a practice known as "line sharing"), because the agency "failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite)." *Id.* at 428.

The United States and the FCC did not ask this Court to review the D.C. Circuit's decision overturning the *Remand Order*. In its response to a certiorari petition filed by CLECs, the government agreed that the *USTA I* decision was "erroneous for many of the

reasons set forth in the petition," that the decision was "in significant tension with this Court's reasoning in *Verizon* and *AT&T*," and that the court of appeals did not accord "appropriate deference to the FCC's reasonable implementation of a complex statute." Fed. Resp. Br. at 14, *WorldCom, Inc.* v. *United States Telecom Ass'n*, cert. denied, 538 U.S. 940 (2003) (No. 02-858). But the government explained that it had decided not to seek review of the D.C. Circuit's decision because the FCC was already in the process of completing its so-called "Triennial Review" proceeding, in which the Commission "as a matter of discretion" had undertaken to engage in "much" of the analysis required by *USTA I*. Fed. Resp. Br. at 17. The Court denied certiorari. 538 U.S. 940 (2003).

3. In August 2003, the Commission issued its *Triennial Review Order*, the agency decision now on review. Pet. App. 66a-1035a. In the *Triennial Order*, the Commission stated that it would find competitive impairment and require unbundling "when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic." *Id.* at 161a. The Commission stated that it would make this determination by asking "whether all potential revenues from entering a market exceed the costs of entry, taking into consideration any countervailing advantages that a new entrant may have." *Ibid.*

Applying its revised impairment standard, the FCC significantly cut back the scope of unbundling that it had mandated under the 1999 *Remand Order*. Among other things, the Commission substantially curtailed mandatory unbundling of the broadband capabilities of ILECs' fiber loops serving residential customers. Pet.

App. 341a-362a. It also decided to phase out line sharing requirements that allowed CLECs to lease the high-frequency portion of copper loops in order to provide broadband services to their customers. *Id.* at 326a-332a. To reduce market disruption, however, the Commission created a three-year transition period for eliminating line sharing. During the first year of the transition, CLECs could obtain new line sharing arrangements by paying 25% of the full loop rate. The following year, the line sharing rate would increase to 50% of the loop rate. Then, in the final year of the transition, the rate for new line sharing arrangements would increase to 75% of the loop rate. *Id.* at 336a-337a.

At the same time, the Commission found that competitive conditions justified the continued unbundling of other elements under Section 251(c)(3). In particular, the Commission maintained unbundling requirements for switches used to serve the mass market (*i.e.*, residential and small business customers) and for dedicated transport facilities below a certain capacity level. Pet. App. 464a-465a, 477a-478a, 549a-551a. In combination with unbundled loops, the availability of unbundled switches and transport facilities enabled CLECs to continue to serve residential users by means of a "platform" of elements obtained entirely from ILECs.

The FCC found that CLECs were generally impaired absent unbundled mass-market switching because they could not use their own switches without obtaining expensive, operationally difficult, and disruptive manual "hot cuts" to rewire connections between the loops used by mass market customers and a CLEC switch. Pet. App. 554a-556a. The Commission found that the need for hot cuts "creates an insurmountable disadvantage to [CLECs] seeking to serve the mass market" by con-

necting their own switches to the loops they would lease from incumbents—even at the low volume of orders that had been placed in the past. *Id.* at 572a-573a. The Commission further determined that incumbents likely would be unable to provide the vastly greater volumes of hot cuts that would become necessary if unbundled switching were eliminated for the mass market and service for new *and existing* mass market customers had to be cut over through the hot cut process to non-ILEC switching facilities. *Id.* at 561a-565a.

The FCC also made national impairment findings for certain categories of dedicated transport. The Commission determined that dedicated transport facilities have natural monopoly characteristics and that there are substantial structural impediments to the deployment of alternative transport facilities. Pet. App. 440a-442a, 473a-477a. The Commission found that a CLEC could earn sufficient revenues to overcome those disadvantages in the case of very-high-capacity transport facilities (for which it found no impairment), but not in the case of lower-capacity facilities such as DS1, DS3, and dark fiber facilities (for which it found impairment and required unbundling on a route-specific basis). *Id.* at 453a-456a, 464a-467a, 470a-471a, 477a-478a.

The Commission recognized that conditions in some local markets might provide a basis for finding that CLECs are not impaired without access to mass-market switching and lower-capacity transport. Pet. App. 486a, 508a-512a, 587a-589a, 596a-597a. The record before the FCC, however, did not contain "sufficiently granular information" to allow the agency to identify individual local markets in which CLECs might not be impaired. *Id.* at 265a. Furthermore, the agency concluded that "states are better positioned than [the

FCC] to gather and assess the necessary information." *Ibid.* The FCC accordingly "delegated" to state commissions the task of analyzing local conditions and determining the ILECs' unbundling obligations for mass-market switching and dedicated transport in any market in which they found no impairment under FCC-prescribed standards. *Id.* at 467a-468a, 471a-473a, 479a-480a, 570a-571a. In particular, the FCC authorized each state commission to create exceptions to the national unbundling requirements in any market where the state commission (1) found that deployment-based triggers were satisfied (*id.* at 481a-503a, 552a-553a, 596a-611a) or (2) determined a lack of impairment by applying the Commission's general impairment standard to the conditions in that local market to identify areas where competitive facilities could potentially be deployed (*id.* at 496a-497a, 503a, 611a-612a).

The Commission addressed the possibility that a state commission might require the unbundling of an element that the FCC had determined not to include on its list of unbundled elements. The Commission invited parties, in that event, to petition the FCC for a declaratory ruling that the state unbundling requirement exceeds the limits on state authority set forth in Section 251(d)(3). The Commission expressed the view that any such state requirement would be "unlikely" to survive scrutiny under Section 251(d)(3)(C), which preempts state laws that are not "consistent with" or "substantially prevent" implementation of the requirements of Section 251. Pet. App. 272a.

The Commission also concluded that the Bell operating companies must continue to provide access to some facilities or services that are no longer generally subject to unbundling under Section 251(c)(3), in accordance with the access requirements that those com-

panies had to satisfy to provide long-distance telephone service under 47 U.S.C. 271. Pet. App. 755a-758a. The Commission determined, however, that the cost-based pricing standard prescribed by Section 252(d)(1)—and the Commission's TELRIC pricing rules—would not apply to facilities or services that Bell companies provide solely to comply with Section 271. Instead, the Commission determined that prices for those facilities or services would be governed by the "just and reasonable" pricing standard set forth in Sections 201 and 202 of the Communications Act of 1934, 47 U.S.C. 201, 202. Pet. App. 758a-764a.

4. On petitions for review, the D.C. Circuit upheld some parts of the *Triennial Order* and vacated others. Pet. App. 1a-65a. Among other things, the court of appeals vacated the rules requiring unbundling of mass-market switching and dedicated transport. *Id.* at 8a-32a. First, the court held that the Commission lacked authority to delegate impairment determinations to the States. *Id.* at 9a-16a, 25a-27a. Having invalidated the States' ability to determine unbundling obligations, the court then vacated the agency's nationwide impairment findings for mass-market switching and dedicated transport. The court reasoned that the Commission, in making the nationwide impairment findings that were subject to further state consideration, did not itself sufficiently account for distinctions among markets or consider more narrowly tailored alternatives to unbundling. *Id.* at 16a-21a, 27a-32a.

The court of appeals rejected the CLECs' challenges to the FCC's rules concerning unbundling of ILEC broadband facilities. The court held that the agency had reasonably decided not to require unbundling of incumbents' broadband facilities in light of record evidence showing that mandatory unbundling of such

facilities was discouraging both incumbents and their potential competitors from investing in new broadband facilities. Pet. App. 34a-35a. The court of appeals also affirmed the Commission's decision to phase out line sharing. The court upheld as reasonable the Commission's conclusion under Section 251(d)(2) that other considerations (including the availability of alternative broadband facilities, the skewed incentives created by the extremely low rates that had been set for the line sharing network element, and the presence of substantial intermodal competition in the provision of broadband Internet access) outweighed any impairment that might result if line sharing arrangements were no longer available. *Id.* at 45a-47a.

Finally, the court of appeals dismissed as unripe the state commissions' challenges to the FCC's discussion concerning preemption of state unbundling requirements. The court determined that the Commission had made only a "general prediction" that state unbundling orders might be preempted in certain circumstances. Because the Commission had not yet taken any final action to preempt specific state regulations, and because deferral of judicial review would not cause any hardship to the state commissions, the court of appeals ruled that the States' preemption claims were not ripe for review. Pet. App. 63a-64a.

5. On August 20, 2004, the FCC released an *Order and Notice of Proposed Rulemaking*, FCC No. 04-179, <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-179A1.pdf>, in which the agency solicited public comment on what unbundling rules it should issue to implement the court of appeals' mandate, and adopted interim measures to limit disruption in telecommunications markets during the pendency of the rulemaking. In a statement accompanying that recent decision, FCC

Chairman Powell noted that he has scheduled a Commission vote on the remand proceeding for December 2004. *Id.* at 41.

ARGUMENT

CLECs and state commissions have petitioned this Court to review the D.C. Circuit's decision. Those parties seek review insofar as the court of appeals upheld the FCC's determinations not to require unbundling of broadband elements and to phase out line sharing; dismissed as unripe contentions that the FCC unlawfully preempted state authority; and vacated the FCC rules requiring ILECs to unbundle mass-market switching and certain dedicated transport facilities, subject to impairment determinations by the States. None of those issues warrants review by the Court in this case.

1. *Broadband Unbundling.* The court of appeals correctly affirmed the FCC's decision not to require unbundling of the broadband capabilities of ILECs' loops. The Commission reasonably applied Section 251(d)(2) when it considered, "at a minimum," whether lack of access to those broadband loop capabilities "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. 251(d)(2). In the *Triennial Order*, the Commission construed the statutory "at a minimum" clause in accordance with its plain terms to authorize the agency to consider factors other than competitive impairment when deciding whether to require unbundling of particular network elements. Pet. App. 247a-258a. The court of appeals correctly held that the Commission's reading of the statute was reasonable, and that the Commission may decline to order unbundling "even in the face of some impairment, where such un-

bundling would pose excessive impediments to infrastructure investment." *Id.* at 37a. The Commission further found that the dampening effect of unbundling requirements on investment in broadband facilities outweighed the limited evidence that competitors would be impaired without unbundled access to certain broadband loops. *Id.* at 341a-362a. Identifying substantial record evidence that supports the agency's conclusion, the court of appeals upheld the Commission's determination not to require unbundling of broadband loop capabilities. *Id.* at 37a-45a.

There is no basis for the CLECs' assertion (04-15 Pet. 15-19) that the court of appeals' decision on the broadband unbundling rules conflicts with this Court's decisions in *AT&T* and *Verizon*. The CLECs rely on the Court's conclusion in *AT&T* that the Act does not impose a "facilities-ownership requirement" on carriers that seek to lease unbundled network elements. 04-15 Pet. 16-17 (quoting *AT&T*, 525 U.S. at 392). But in *AT&T*, this Court determined only that the Act does not require competing carriers to deploy some facilities of their own before they may lease any unbundled ILEC facilities. That determination has no bearing on the entirely different question whether considerations of investment incentives may justify a decision by the FCC to eliminate broadband unbundling obligations.

Contrary to the assertions of the CLECs (04-15 Pet. 17-18), the court's affirmance of the FCC's application of Section 251(d)(2) to broadband elements also does not conflict with *Verizon*. In that case, this Court rejected the ILECs' contention that the FCC's use of the TELRIC methodology to set rates for unbundled elements created unreasonable disincentives to invest in new facilities. Citing record evidence of significant investment in local telephone facilities by new com-

petitors, the Court concluded that the challenged regulatory scheme "is not easily described as an unreasonable way to promote competitive investment." 535 U.S. at 517. The *Verizon* decision did not foreclose the possibility that the Commission might in the future decline to require unbundling of particular facilities, such as new broadband loop facilities, out of concern for the effect such unbundling might have on investment incentives. Indeed, the Court in *Verizon* expressly declined to endorse the specific policies before it. See *id.* at 517, 539.

The court of appeals noted that the Commission had found evidence in its Triennial Review proceeding that the "regulatory environment" of unbundling had deterred ILECs from deploying the electronic equipment needed to provide broadband service over hybrid fiber-copper loops. Pet. App. 39a-40a, 356a-357a. Substantial record evidence also supported the Commission's conclusion that elimination of broadband unbundling requirements would give both ILECs and CLECs greater incentives to build out all-fiber loops to their customers' premises. *Id.* at 40a-41a, 312a-313a, 341a-342a, 356a-357a. On the basis of that evidence specifically addressing broadband facilities, the Commission reasonably decided to lift certain broadband unbundling requirements even though the absence of such unbundling might create some impairment. The court of appeals' affirmance of that decision involves a fact-bound application of Section 251 and does not conflict with any decision of this Court or any court of appeals.

Contrary to the CLECs' suggestion (04-15 Pet. 21), moreover, the FCC acted consistently with the Act when it considered investment incentives as part of its broadband unbundling analysis. In *Verizon*, this Court affirmed the Commission's rules for pricing network

elements after similarly considering whether those rules would unduly discourage the development of facilities-based competition. *Verizon*, 535 U.S. at 501-523. Moreover, Congress commanded the FCC to promote broadband investment. Section 706 of the 1996 Act directs the Commission to "encourage the deployment * * * of advanced telecommunications capability to all Americans" by utilizing "regulating [sic] methods that remove barriers to infrastructure investment." 110 Stat. 153 (47 U.S.C. 157 note). The Commission determined in the *Triennial Order* that it could best foster broadband investment and facilities-based competition by relieving ILECs of certain unbundling obligations with respect to broadband facilities. That determination does not merit further review.

2. *Line Sharing and Preemption*

a. The court of appeals correctly upheld the FCC's decision to phase out line sharing requirements, under which ILECs had been required to provide access to the high-frequency portion of their copper loops to CLECs for the provision of broadband services. Pet. App. 45a-47a.

In attacking that aspect of the *Triennial Order*, the state commissions focus principally on the FCC's finding that broadband service provided over cable television systems ("cable modem service") is a competitive alternative to broadband services that are provided over ILEC networks. 04-18 Pet. 14-17; 04-12 Pet. 28; see Pet. App. 331a-332a. The state commissions contend that cable modem service is not widely available in every State. Even assuming that to be true, however, it is irrelevant here. The Commission made clear—and the court of appeals understood—that the competitive alternative provided by cable modem

service was not the "dispositive" factor in the agency's decision to end line sharing. *Id.* at 46a, 332a. Rather, the Commission determined that continuing the ILECs' line sharing obligations was unnecessary under Section 251(d)(2) because CLECs could economically provide broadband service by leasing the entire loop (not just the high-frequency portion) from an ILEC. Applying its impairment standard, which takes into account all potential revenues from a loop's various uses (including voice, data, video, and other services), the Commission concluded that the revenues from those services *collectively* "would offset the costs associated with purchasing the entire loop." *Id.* at 45a; see *id.* at 327a-328a. The state commissions do not seriously contest that fact-bound conclusion.

The Commission also found substantial evidence on the record before it that, even if ILECs did not have to share their loops with CLECs in line sharing arrangements, in light of the rules adopted in the *Triennial Order*, CLECs could lease entire unbundled loops and enter into "line-splitting" arrangements with other CLECs—under which one CLEC provides broadband service using the high-frequency capabilities of the loop, while another CLEC (rather than the ILEC, as in line sharing) uses the low-frequency portion of the loop to provide voice service. Pet. App. 45a, 328a-329a. In light of all those factors, the Commission reasonably decided to discontinue mandatory line sharing. The agency's conclusion about the significance of the record evidence raises no issue that would warrant review by this Court.

b. To address the legitimate business concerns of CLECs that have used line sharing arrangements to provide broadband service to their customers, and to protect those customers from service disruption or

drastic rate changes, the Commission adopted a three-year plan for phasing out the ILECs' line sharing obligations and phasing in associated price increases in annual increments. California contends that the Commission's formula for setting rates for transitional line sharing during this three-year period impermissibly preempts state ratemaking authority. 04-18 Pet. 20-23. Because it appears that no party raised that issue before the FCC, the issue cannot be raised on judicial review of the *Triennial Order*. See 47 U.S.C. 405; *Bartholdi Cable Co.* v. *FCC*, 114 F.3d 274, 279-280 (D.C. Cir. 1997). This preemption issue, moreover, received so little attention in the briefs below that the court of appeals did not even address it. See *Glover* v. *United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below."). In any event, the issue concerns a three-year transition period, of which one year already has run. It therefore lacks ongoing importance.

Finally, California's ratesetting-preemption claim lacks merit. The FCC has authority to adopt pricing methodologies for unbundled network elements, which the States then apply. *AT&T*, 525 U.S. at 377-385. Like the pricing rules at issue in *AT&T* and *Verizon*, the Commission's transitional pricing rules for line sharing do not set specific rates. Rather, they require that line sharing rates reflect certain percentages of the full loop rate that is set by the relevant State. Consistent with the statutory division of responsibilities between the FCC and the States, the FCC has established a methodology and the States will "implement that methodology, determining the concrete result in particular circumstances." *Id.* at 384. Furthermore, the States' past efforts to establish line sharing rates justified the FCC's decision to place limits on the

States' discretion to set transitional rates. As the court of appeals observed, most States had previously set line sharing rates "at approximately zero," which "distorted competitive incentives." Pet. App. 45a-46a. The Commission's transitional rate formula was reasonably designed to address that problem.

c. California contends that the FCC unlawfully preempted state authority to require line sharing when it is not required under FCC rules. 04-18 Pet. 23-28. The court of appeals correctly ruled that that contention is not ripe in the instant proceeding. Pet. App. 63a-64a. Contrary to California's suggestion, the *Triennial Order* does not include final FCC action preempting any state line sharing rule or other unbundling requirement. In paragraph 195 of the *Triennial Order*, the Commission invited parties to seek declaratory rulings from the FCC if they believe that a particular state unbundling obligation is inconsistent with the limits on state authority in 47 U.S.C. 251(d)(3) and the FCC's rules. Pet. App. 272a. The Commission predicted that if States require line sharing or unbundling of elements that the FCC has determined not to subject to mandatory unbundling under Section 251, such state requirements are "unlikely" to be found consistent with the 1996 Act. *Id.* at 63a, 272a. But the Commission did not preempt any state rules, and it is uncertain whether the FCC ever will issue a preemption order of this sort in response to a request for declaratory ruling. See *Alascom, Inc.* v. *FCC*, 727 F.2d 1212, 1218-1220 (D.C. Cir. 1984). There also is no urgency to review that issue before a concrete controversy involving a particular state ruling is presented. Under the circumstances, California's preemption claim is not ripe for review. See *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 807-812 (2003);

Ohio Forestry Ass'n v. *Sierra Club*, 523 U.S. 726, 732-737 (1998).

Even if California's preemption claim were ripe, California is wrong in arguing (04-18 Pet. 24-26) that the FCC's unbundling rules lack preemptive effect. This Court has long recognized that "[f]ederal regulations have no less pre-emptive effect than federal statutes." *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 153 (1982). Accordingly, "[t]he statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988).

California incorrectly contends that Section 251(d)(3), which preserves some state authority, effectively nullifies the preemptive power of the FCC's unbundling regulations. Unless Congress expressly provides otherwise, a statutory "saving clause" such as Section 251(d)(3) does not diminish the preemptive force of federal regulations. See *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 869-874 (2000). Section 251(d)(3) is essentially a "conflict-preemption" provision and is, therefore, limited in scope. It does not preserve all state network-access requirements, but only preserves those state regulations that are "consistent with the requirements" of Section 251 and do "not substantially prevent implementation" of those requirements. 47 U.S.C. 251(d)(3)(B) and (C). Because Congress authorized the Commission to set standards governing the determination of "what network elements should be made available," 47 U.S.C. 251(d)(2), state laws or rulings inconsistent with the FCC's unbundling regulations would be inconsistent with the congressionally authorized "implementation of the requirements of

[Section 251]," 47 U.S.C. 251(d)(3)(C), and hence preempted.

d. The National Association of Regulatory Utility Commissions and the Arizona Corporation Commission (collectively NARUC) make a similar preemption claim concerning the pricing of facilities or services for which the FCC has determined not to continue unbundling obligations under 47 U.S.C. 251(c)(3). 04-12 Pet. 29-30. The Bell companies must continue to provide some facilities or services under the separate requirements of 47 U.S.C. 271, the statute that governs the Bell companies' entry into the long-distance market. In the *Triennial Order*, the FCC ruled that the cost-based pricing standard prescribed by 47 U.S.C. 252(d)(1) does not apply to those facilities or services that must be made available only under Section 271, rather than under Section 251. The Commission stated that, in that situation, rates must comply with the "just and reasonable" pricing standard in Sections 201 and 202 of the Communications Act of 1934, 47 U.S.C. 201, 202. Pet. App. 758a-764a. The Commission also stated that determining a Bell company's compliance with that pricing standard for a particular facility or service requires "a fact-specific inquiry" that the agency will undertake, if necessary, "in an enforcement proceeding brought pursuant to section 271(d)(6)." *Id.* at 764a.

NARUC claims that the FCC's "pricing proposal" under Section 271 intrudes on the States' authority to set rates for network elements. 04-12 Pet. 29-30. That issue was not prominently raised in the briefs below, and the court of appeals did not address it. The issue is unripe for consideration by this Court for another reason as well. As petitioners acknowledge, 04-12 Pet. 29, the FCC has made only a pricing "proposal." The Commission has yet to apply its announced "just and

reasonable" approach to rates in any State. Unless and until the Commission conducts an enforcement proceeding under Section 271(d)(6) to review rates in a particular State, there is no final agency action for a court to review, nor any concrete injury to NARUC.

In addition, NARUC is wrong to suggest that the FCC's pricing proposal forecloses the States from setting rates for facilities or services that are provided solely to comply with Section 271. In the *Triennial Order*, the FCC expressed no opinion as to precisely what role the States would play in establishing rates under Section 271. Until the Commission expressly addresses that question, the matter is not suitable for judicial review.

In any event, NARUC's challenge to the FCC's pricing discussion rests on a flawed legal premise. NARUC suggests that Section 252 of the Act gives state commissions exclusive authority to set rates for network elements and equivalent facilities and services under all circumstances. 04-12 Pet. 29-30. That is incorrect. Section 252(c)(2) directs state commissions to "establish any rates for * * * network elements *according to subsection (d)*." 47 U.S.C. 252(c)(2) (emphasis added). Section 252(d) specifies that States set "the just and reasonable rate for network elements" *only* "for purposes of [47 U.S.C. 251(c)(3)]." 47 U.S.C. 252(d)(1). The statute makes no mention of a state role in setting rates for facilities or services that are provided by Bell companies to comply with Section 271 and are *not* governed by Section 251(c)(3). The FCC reasonably concluded that it is authorized to review the rates for those facilities or services, because the statute elsewhere expressly empowers the FCC to enforce compliance with

the requirements of Section 271. See 47 U.S.C. 271(d)(6).[2]

3. *Narrowband Unbundling.* Finally, all of the petitioners seek review of the D.C. Circuit's vacatur of the agency rules requiring the unbundling of mass-market switching and dedicated transport. 04-15 Pet. 22-30; 04-12 Pet. 15-28; 04-18 Pet. 29. The court of appeals vacated those rules on the grounds that: (1) the FCC lacked authority for its delegation to the States of responsibility for deciding whether the FCC's unbundling standards would allow an ILEC to obtain relief for particular facilities in particular geographic areas; and (2) without that state-based exception process, the FCC's nationwide findings of impairment with respect to mass-market switching and dedicated transport were overly broad. Pet. App. 8a-27a.

The D.C. Circuit's analysis of the FCC's nationwide impairment findings is inconsistent in some respects with the applicable principles of deferential judicial review. As this Court has recognized, the 1996 Act is a complex statute replete with ambiguity, and Congress "is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *AT&T*, 525 U.S. at 397; see *Verizon*, 535 U.S. at 539 ("The job of judges is to ask whether the Commission made choices reasonably within the pale of statutory possibility in deciding what and how items must be leased and the way to set rates for leasing

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[2] This case does not involve the question whether state commissions may arbitrate issues outside the scope of Section 251(c) when parties voluntarily include those issues within negotiations toward an interconnection agreement. See generally *Coserv Limited Liability Corp.* v. *Southwestern Bell Tel. Co.*, 350 F.3d 482 (5th Cir. 2003).

them."). Nevertheless, the Commission intends to proceed expeditiously to adopt new rules in light of the requirements specified by the D.C. Circuit in *USTA I* and this case. In its Notice of Proposed Rulemaking concerning those new rules, the Commission recognized "the necessity of formulating permanent rules quickly" and stated its intent to issue such rules within approximately six months. See FCC No. 04-179, ¶¶ 15, 21 <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-179A1.pdf>. The Chairman of the FCC has scheduled the matter for a vote by the full Commission in December 2004. See pp. 13-14, *supra*.

Quick agency action to establish new rules consistent with the court of appeals' decision will avoid the uncertainty—for consumers and the communications industry as a whole—that would be associated with the process of merits review by this Court and any ensuing remand proceedings in the court of appeals. For that reason, and to conserve both judicial and agency resources, the government has concluded that the court of appeals' decision does not, on balance, warrant review at this time.

a. The ILECs contended below—and the court of appeals agreed—that the FCC lacked authority under the Communications Act to delegate to the state commissions a central role in making final unbundling determinations for mass-market switching and some types of dedicated transport. Although the court of appeals discussed delegation issues generally, see Pet. App. 10a-16a, its conclusion was that the provisions of the Communications Act do not indicate with sufficient clarity a congressional authorization for the specific state role established by the *Triennial Order*. *Id.* at 9a-10a. That conclusion is not in conflict with any other judicial decision specifically addressing the Act. Fur-

thermore, the D.C. Circuit has not applied the delegation analysis described in the instant decision in any other context, and the practical consequences of its approach are unclear. For those reasons, it would be premature for this Court to consider the broader delegation questions asserted by the petitions for certiorari, including the arguments that the court of appeals' reasoning conflicts in some respects with *Batterton* v. *Francis*, 432 U.S. 416 (1977), and *Wisconsin Department of Health & Family Services* v. *Blumer*, 534 U.S. 473 (2002).

b. In this case and *USTA I*, the D.C. Circuit imposed on the Commission, in conducting its impairment analysis under Section 251(c)(3) and (d)(2), requirements that go beyond those found in the statute itself. As the court of appeals has recognized, the 1996 Act provides the FCC with "no detail" about how to carry out the "extraordinar[ily] complex[]" task of determining which network elements incumbent carriers must make available to competitors. *USTA I*, 290 F.3d at 421-422. Furthermore, as the government explained in its response to the petition for certiorari in *USTA I*,[3] the D.C. Circuit's constraints on the FCC's impairment analysis are in tension with this Court's reasoning in *AT&T* and *Verizon*. In those cases, this Court reaffirmed and applied the settled principle that reviewing courts must generally defer to an expert agency's reasonable implementation of a complex, broadly drafted statute. See, *e.g.*, *AT&T*, 525 U.S. at 397; *Verizon*, 535 U.S. at 539; see generally *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-845 (1984).

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[3] Fed. Resp. Br. at 14-16, *WorldCom, Inc.* v. *United States Telecom Ass'n*, *supra* (No. 02-858).

Nevertheless, the court of appeals did not purport to apply the statutory impairment standard conclusively to particular facts. The court instead stated that it was making "general observations" about its understanding of the impairment standard and required the Commission to conduct "a re-examination" of impairment issues on remand and "implement a lawful scheme." Pet. App. 21a, 22a, 27a. As noted, the FCC intends quickly to issue new network-unbundling rules that comply with the court of appeals' decision. In light of that intention, and for the other reasons stated above, the United States and the FCC have concluded that this aspect of the court of appeals' decision does not warrant further review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, ET AL.,
Petitioners,

AT&T CORP., ET AL.,
Petitioners,

AND

PEOPLE OF THE STATE OF CALIFORNIA, ET AL.,
Petitioners,

v.

UNITED STATES TELECOM ASSOCIATION, ET AL.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

1. Whether the D.C. Circuit correctly determined that the FCC may not subdelegate to 51 separate state regulatory commissions the responsibility that Congress expressly assigned to the FCC to determine which "network elements" incumbent local exchange carriers must make available to their competitors on an "unbundled" basis.

2. Whether the D.C. Circuit, in reversing the FCC's decision to require blanket nationwide unbundling of certain facilities, reasonably applied established principles of administrative law when it concluded, for example, that the FCC ignored significant alternatives raised in the record.

3. Whether the FCC acted reasonably in finding that it is consistent with 47 U.S.C. § 251(d)(2)(B) to require only limited unbundling of broadband facilities when, among other things, there is already extensive competition in the market for broadband services and competitors can provide broadband services by relying on other unbundled network elements.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc., the United States Telecom Association, and the Verizon telephone companies state the following:

BellSouth Corporation has no parent company, and no publicly held company owns 10% or more of its stock.

Qwest Communications International Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

SBC Communications Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

The United States Telecom Association ("USTA") is the nation's oldest and leading not-for-profit trade association for the local telephone industry. Founded more than a century ago, USTA's carrier members provide a full array of voice, data, and video services over wireline and wireless networks. USTA also has international and associate members that include consultants, communications equipment providers, banks and investors, and other parties with interests in the local exchange carrier industry. USTA has no parent companies, subsidiaries, or affiliates for which disclosure is required.

The Verizon telephone companies are wholly owned subsidiaries of Verizon Communications Inc., a publicly held company. Those subsidiaries are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.

Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.

Verizon Communications Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENTS ii

TABLE OF AUTHORITIES v

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE PETITIONS 13

I. THE D.C. CIRCUIT'S INVALIDATION OF THE FCC'S REIMPOSITION OF BLANKET NARROWBAND UNBUNDLING DOES NOT MERIT REVIEW 13

II. THE D.C. CIRCUIT'S AFFIRMANCE OF THE FCC'S DECISION LIMITING UNBUNDLING OF COMPETITIVE BROADBAND FACILITIES DOES NOT MERIT REVIEW 25

III. PETITIONERS' ADDITIONAL ARGUMENTS ARE EQUALLY INSUBSTANTIAL 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

AT&T Corp. v. Iowa Utils. Bd.:

525 U.S. 366 (1999) ..... *passim*

531 U.S. 1124 (2001) 15

Abbott Labs. v. Gardner, 387 U.S. 136 (1967) 30

Batterton v. Francis, 432 U.S. 416 (1977) 17, 18, 19

Chevron U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837 (1984) 23, 27

Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) 24

Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 24

Printz v. United States, 521 U.S. 898 (1997) 17

Southern Pac. Transp. Co. v. Watt, 700 F.2d 550 (9th Cir. 1983) 20

USTA v. FCC, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003) 5, 6, 15, 21, 22, 23

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 21, 28

Verizon Communications, Inc. v. FCC, 535 U.S. 467 (2002) ..... *passim*

Vierra v. Rubin, 915 F.2d 1372 (9th Cir. 1990) 20

Wisconsin Dep't of Health & Family Servs. v. Blumer, 534 U.S. 473 (2002) 17, 19, 20

WorldCom, Inc. v. USTA, 538 U.S. 940 (2003) 6, 15

ADMINISTRATIVE DECISIONS

First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) 4

Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912 (1999), *vacated and remanded, USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003) 5, 6

ADMINISTRATIVE MATERIALS

Indus. Anal. & Tech. Div., Wireline Competition Bureau, FCC, *High-Speed Services for Internet Access: Status as of December 31, 2003* (June 2004) 29

William E. Kennard, Chairman, FCC, *Moving On*, Remarks Before the NARUC Winter Meeting, Washington, D.C. (Feb. 23, 1999) 5

Press Release, FCC, *FCC Chairman Michael K. Powell Announces Plans for Local Telephone Competition Rules* (June 14, 2004) 13

Press Release, FCC, *Office of Solicitor General Will Not Appeal DC Circuit Decision* (June 9, 2004) 13

STATUTES

Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*:

47 U.S.C. § 157 note 26

47 U.S.C. § 201 30

47 U.S.C. § 251 ..... 29, 30

47 U.S.C. § 251(c)(3) 3, 4, 29

47 U.S.C. § 251(d) 16

47 U.S.C. § 251(d)(1) 4, 16

47 U.S.C. § 251(d)(2) ..... *passim*

47 U.S.C. § 251(d)(2)(B) 2, 4

47 U.S.C. § 252 ..... 27, 29, 30

47 U.S.C. § 252(b)(4)(C) 16

47 U.S.C. § 252(c)(1) 16

47 U.S.C. § 252(d) 17

47 U.S.C. § 252(d)(1) 29

47 U.S.C. § 271 29

47 U.S.C. § 271(d)(3) 29

47 U.S.C. § 271(d)(6)(A) 29

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ..... *passim*

§ 706, 110 Stat. 153 ..... 10, 26, 27

42 U.S.C. § 607(a) 18

LEGISLATIVE MATERIALS

S. Conf. Rep. No. 104-230 (1996) 3

OTHER MATERIALS

Brief for the FCC and the United States, *Verizon Communications, Inc. v. FCC*, Nos. 00-511 *et al.* (U.S. filed Nov. 17, 2000) 15

Brief for the Federal Respondents, *WorldCom, Inc. v. USTA*, No. 02-858 (U.S. filed Feb. 5, 2003) 15

Brief in Opposition for Time Warner Entertainment Co. and AT&T Corp., *Consumer Fed'n of Am. v. FCC*, No. 01-223 (U.S. filed Nov. 2, 2001) 1, 14

66 Fed. Reg. (2001):

p. 46763 19

p. 46767 19

Petition for a Writ of Certiorari, *AT&T Corp. v. Iowa Utils. Bd.*, No. 00-590 (U.S. filed Oct. 13, 2000)..... 15

Solicitor General Authorizes FCC To Represent Itself in Appeal, Reuters (June 9, 2004) 13

PRELIMINARY STATEMENT

Petitioners raise two sets of issues. Neither merits plenary review by this Court.

First, petitioners claim that the D.C. Circuit wrongly invalidated the FCC's third attempt to impose the same "blanket" unbundling requirements for narrowband facilities that this Court vacated in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) ("*IUB*"). The FCC and the United States, however, have decided *not* to seek review of that ruling. As petitioner AT&T has itself argued in similar circumstances, "[i]f the expert agency charged with administering [a particular regulatory issue] has determined that the court of appeals' decision does not undermine its programmatic objectives to such an extent as to warrant further review, then there is no cause for this Court to conclude otherwise."[1] That is precisely right, and it accords with this Court's consistent practice. Indeed, we are not aware of a single case — and petitioners do not cite one — in which this Court has granted review of a decision invalidating a federal agency rule where the government itself did not seek review.

Moreover, the FCC has stated that it intends to adopt new narrowband unbundling rules by December 15 of this year. The rules at issue here may thus be supplanted before this Court could even hear this case, much less decide it on the merits. There is no reason for the Court to address issues that are slated to become moot before a decision can be reached.

Even aside from these threshold considerations, the judgment below does not merit review. Petitioners argue that, when Congress assigns a specific task to a federal agency, that agency remains free to subdelegate its responsibility to a state agency that is not accountable to Congress. Simply put, in petitioners' view, every time Congress directs a federal agency to do something, it must add a "thou shalt not delegate" codicil to the statute or risk having the agency assign that task to representatives of a separate sovereign. The D.C.

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[1] Br. in Opp. for Time Warner Entertainment Co./AT&T Corp. at 12, *Consumer Fed'n of Am. v. FCC*, No. 01-223 (U.S. filed Nov. 2, 2001).

Circuit properly rejected that facially untenable position, and not a single decision supports it.

AT&T and NARUC also challenge the D.C. Circuit's identification of specific flaws in the FCC's impairment analysis for these narrowband facilities. The questions they present, however, involve the routine application of settled principles of administrative law, such as an agency's obligation to consider alternatives raised by parties to a rulemaking proceeding and to provide an adequate and reasoned explanation for its choices.

Moreover, contrary to AT&T's assertion, the D.C. Circuit's analysis is entirely consistent with — indeed, largely dictated by — this Court's decisions. The D.C. Circuit's insistence that impairment decisions be made in the context of geographic markets follows directly from this Court's holding in *IUB* that Congress required the FCC to consider the availability of alternative facilities outside the incumbent local exchange carrier's network. *See* 525 U.S. at 389-90. One cannot rationally consider the availability of such alternatives without looking at a geographic market; otherwise, incumbents could be required to offer facilities in New York solely because there are no alternative facilities in rural Iowa. Likewise, *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002), makes plain that unbundling should be limited to true "bottleneck" facilities to encourage facilities-based competition in other facilities that competitors could provide themselves: as this Court stated, "entrants may need to share some facilities that are very expensive to duplicate . . . in order to be able to compete in other, more sensibly duplicable elements." *Id.* at 510 n.27. That understanding is wholly consonant with the D.C. Circuit's judgment here.

Second, petitioners raise a series of run-of-the-mine agency review issues on which the D.C. Circuit affirmed the determinations of the FCC. These issues arise primarily from the FCC's reasonable and fact-bound conclusions (1) that competitive local exchange carriers are for the most part not "impaired," within the meaning of 47 U.S.C. § 251(d)(2)(B),

without access to certain facilities used to provide high-speed "broadband" services (that is, services such as high-speed Internet access), (2) that any conceivable impairment can be addressed with limited unbundling and access to alternative equipment, and (3) that unbundling is contrary to the intent of Congress where, as here, the market is fully competitive and incumbent local exchange carriers are in fact secondary players. There is no compelling reason for this Court to review the D.C. Circuit's affirmance of such discrete, record-based agency judgments.

STATEMENT OF THE CASE

1. The Telecommunications Act of 1996 ("1996 Act") seeks to transform local telecommunications from a market characterized by exclusive franchises to one in which multiple providers compete to provide more efficient and innovative service over their own facilities. *See, e.g.*, S. Conf. Rep. No. 104-230, at 148 (1996) (finding that "meaningful facilities-based competition" is possible). Because Congress understood, however, that new entrants into local markets (known as competitive local exchange carriers or "CLECs") might not be able to duplicate immediately *every* aspect of a local telephone network, the statute allows them to obtain "*[s]ome* facilities and capabilities" from the incumbent local exchange carrier ("ILEC"). *Id.* (emphasis added). The piece-parts of the ILEC's network that must be shared are known as unbundled network elements or "UNEs." *See* 47 U.S.C. § 251(c)(3). As this Court has explained, access to some difficult-to-duplicate network elements may enhance facilities-based competition by allowing new entrants to compete using other, more-easily duplicated facilities of their own. *See Verizon*, 535 U.S. at 510 n.27 ("competition as to 'unshared' elements may, in many cases, only be possible if incumbents simultaneously share with entrants some costly-to-duplicate elements").

The 1996 Act assigns to the FCC the job of identifying the "bottleneck" facilities, *id.* at 507, that are unsuitable for competitive supply and thus should be made available as

UNEs. Congress directed "*the Commission* . . . to establish regulations to implement the requirements of [§ 251]," including the provisions governing the UNEs that incumbents must make available to CLECs. 47 U.S.C. § 251(d)(1) (emphasis added). Furthermore, Congress specified that, "*[i]n determining what network elements should be made available* for purposes of" § 251(c)(3), "*the Commission* shall consider, at a minimum, whether . . . the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." *Id.* § 251(d)(2)(B) (emphases added). Accordingly, the FCC has acknowledged that Congress "direct[ed]" the "Commission" to undertake the "analysis required to determine what network elements should be made available," App. 259a (¶ 179),[2] and thus that "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations," App. 264a (¶ 187).

2. In its 1996 *Local Competition Order*,[3] the FCC exercised its § 251(d)(2) authority to determine what network elements should be made available, but it failed to confine its unbundling requirements to bottleneck facilities that could not reasonably be duplicated. Instead, it required access to *all* narrowband voice facilities *everywhere*.

This Court vacated these "blanket" unbundling rules in *IUB*. As the Court explained, the FCC erred in presuming that ILECs had a baseline duty to provide unbundled access to *all* network elements for which such access was technically feasible and that the "impairment" standard "merely permitt[ed] it to soften that obligation by regulatory grace." *IUB*, 525 U.S. at 391. The Court held that a finding of "impairment" is a prerequisite to unbundling and, moreover, that the statute "requires the Commission to determine on a rational basis *which* network elements must be made avail-

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[2] "App." refers to the appendix to AT&T's certiorari petition.

[3] 11 FCC Rcd 15499 (1996) (subsequent history omitted).

able." *Id.* at 391-92. In applying that standard, the Court stated, the FCC (1) must consider whether competitors could engage in facilities-based competition by deploying or obtaining facilities from sources other than the incumbent, and (2) cannot treat any increase in cost considered in isolation as an "impairment." *See id.* at 389-90. In short, the statute places "clear limits" on the FCC's unbundling authority and requires it to adopt a "limiting standard" for unbundling that is "rationally related to the goals of the Act." *Id.* at 388, 397.

3. On remand from *IUB*, the FCC failed to heed this Court's directions. The FCC's then-Chairman dismissed this Court's decision as a mere "bump in the road,"[4] and the FCC proceeded to adopt blanket national unbundling rules that were substantively identical to the ones this Court had vacated. In a separate *Line Sharing Order*,[5] moreover, the FCC for the first time added to the UNE list facilities used exclusively in the highly competitive market for "broadband" services such as high-speed Internet access. *See USTA v. FCC*, 290 F.3d 415, 419-21 (D.C. Cir. 2002) ("*USTA I*") (describing the 1999 unbundling rules in detail), *cert. denied*, 538 U.S. 940 (2003).

On review of those decisions, a unanimous D.C. Circuit panel, applying the principles established by this Court's decision in *IUB*, vacated the FCC's second set of unbundling rules. The court of appeals held that the FCC's purportedly revised unbundling standard remained deficient in key respects. Among other things, the Commission had refused to make any geographic or product-market distinctions in determining whether, as this Court had required, alternative facilities are, or could reasonably be made, available. *See id.* at 422.

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[4] William E. Kennard, Chairman, FCC, *Moving On*, Remarks Before the NARUC Winter Meeting, Washington, D.C. (Feb. 23, 1999).

[5] 14 FCC Rcd 20912 (1999) (subsequent history omitted).

The D.C. Circuit also invalidated the *Line Sharing Order* because the FCC focused exclusively on a single broadband technology — DSL — and failed to address the agency's own findings that the broadband market as a whole (which includes market-leading cable-modem providers) was already characterized by "robust competition" and was in fact "domina[ted]" by cable. *Id.* at 428.

Several private parties, but (as in this case) not the FCC or the United States, filed a petition for certiorari seeking review of the D.C. Circuit's *USTA I* decision. This Court denied that petition. *See WorldCom, Inc. v. USTA*, 538 U.S. 940 (2003) (No. 02-858).

4. Despite these two judicial vacaturs, and over a scathing dissent from FCC Chairman Powell, a 3-2 majority of the FCC declined yet again on remand to impose any meaningful limit on blanket nationwide unbundling of basic narrowband voice facilities.

The FCC majority reached that result in the teeth of an extensive record demonstrating that CLECs could provide, and in fact were providing, their own facilities in many markets around the country. Among other things, the record showed that more than 200 competitors had deployed in excess of 1,300 circuit switches that were being used — in wire centers covering 86% of Bell company lines — to serve more than 16 million lines, including 3 million residential lines. *See* C.A. App. 979; App. 980a (Powell Stmt.).[6] Similarly, in 49 of the top 50 markets in the country, there were five or more competitors self-providing high-capacity transmission facilities between switches, and competitors had deployed at least

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[6] In addition, the record showed, there were approximately 9,500 CLEC "packet switches" that are increasingly being used to provide voice as well as data services, and incumbents were also facing extensive and rapidly increasing competition for both lines and minutes from wireless services. *See* Declaration of Robert D. Willig ¶ 88, attached to Comments of AT&T Corp., CC Docket Nos. 01-338 *et al.* (FCC filed Apr. 5, 2002) ("CLECs had deployed 9,524 data switches by 2001").

184,000 miles of such facilities. *See* C.A. App. 1021-22, 1182-201.

Despite the overwhelming evidence presented to the FCC, the state commissions, which the statute charges with *implementing* the FCC's unbundling rules, urged the FCC to delegate to them unrestricted authority to make the ultimate unbundling decisions.[7] The FCC majority did precisely that, leaving the state commissions free to perpetuate maximum unbundling. For both mass-market switching and high-capacity facilities (including both the transmission facilities that connect switches and the loops that connect switches to larger customers), the FCC adopted provisional findings of impairment designed to keep maximum unbundling in place temporarily. It then expressly "delegated" to 51 separate state commissions its duty under § 251(d)(2) to make the ultimate determination of which network elements must be made available. *See* App. 265a-268a (¶¶ 188-190). These state decisions were to be effective without any review or approval by the FCC. *See, e.g.*, App. 513a (¶ 426).

More particularly, for "mass-market" switching,[8] the FCC made a provisional finding of impairment pending the state determinations, based solely on supposed difficulties with the "hot-cut" process by which a loop (the wire or equivalent facility running from a switch to an end-user's premises) is transferred from an incumbent's switch to a competitor's switch. App. 507a (¶ 422). The FCC barely acknowledged

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[7] Ex Parte Letter from David A. Svanda, President, NARUC, *et al.*, to Michael Powell, Chairman, FCC, *et al.* (Nov. 20, 2002) (attaching letter from representatives of 34 state commissions seeking to retain the authority to impose unbundling without "[a]ny restriction" on their ability to do so) (C.A. App. 1707).

[8] The "mass market" generally includes residential and small-business customers. The FCC did not require switch unbundling for generally larger-business "enterprise" customers, but the record here demonstrated that that covered a miniscule fraction of all switched lines. *See* C.A. App. 624.

that it had previously approved hot-cut processes in virtually every state (and the District of Columbia), nor did it consider whether other mechanisms that had been suggested by commenters could address supposed hot-cut problems without the need for unbundling on a nationwide basis.

The FCC then gave state commissions nine months to determine whether to mandate switch unbundling on a permanent basis. During that time, state commissions were to apply a two-stage analysis. First, the state commissions were to find "no impairment" when either "three or more unaffiliated competing carriers each is serving mass market customers in a particular market with the use of their own switches" or "two competitive wholesale providers" of switching are serving the market. App. 606a, 610a (¶¶ 501, 505). Any semblance of objectivity to this test was undermined by the fact that the FCC left it completely to the states to "define the markets in which they will evaluate impairment." App. 599a (¶ 495). If this first test was not satisfied, the states were next to determine the potential ability of CLECs to deploy their own switches based on what FCC Chairman Powell, in dissent, called a "shot-gun blast of every imaginable economic criterion." App. 973a (Powell Stmt.); *see* App. 611a-630a (¶¶ 506-520). In sum, the FCC's Order "let[] the states make crucial decisions regarding market definition and application of the FCC's general impairment standard . . . , with FCC oversight neither timely nor assured." App. 13a-14a.

The FCC employed a similar strategy for transport facilities and high-capacity loops. Although the Commission did not dispute that competitors had deployed these facilities in many markets, it nevertheless made provisional findings of *nationwide* impairment on the ground that it could not determine the *specific routes* on which CLECs had deployed such facilities. *E.g.*, App. 385a-386a (¶ 314).

The FCC then again delegated to the states the authority to make the ultimate unbundling determinations according to another two-stage inquiry. At the first stage, states were to

grant relief from unbundling only if multiple alternative providers had already deployed facilities on a specific point-to-point route. *E.g.*, App. 400a (¶ 329). At the second stage, states were to use their "analytical flexibility" to consider a long series of factors and determine whether CLECs could deploy facilities at locations where they have not already done so. *E.g.*, App. 405a (¶ 335). In the FCC's own words, its Order "provide[d] no guidance on how these various factors are to be assessed and weighed." App. 509a (¶ 425 n.1300).

In contrast to its decision to maintain maximum unbundling for traditional narrowband voice facilities, the FCC decided to impose limited unbundling obligations on most facilities used to provide high-speed broadband services. For example, subject to a transition period, the Commission freed incumbents from the obligation to offer "line sharing" — that is, access only to the high-frequency portion of the loop used to provide high-speed DSL service — as an unbundled network element. Contrary to the suggestions in the petitions, *e.g.*, Cal. Pet. 13, the Commission determined that CLECs are not impaired within the meaning of § 251(d)(2) without line sharing. *See* App. 327a-330a (¶¶ 258-260). Even beyond that finding, the Commission concluded that, given the extensive intermodal competition (primarily from cable-modem providers, but also from wireless, satellite, and power lines), competition in the broadband market was not dependent on unbundling, and, moreover, mandating unbundling would in fact decrease facilities-based competition, in conflict with a core goal of the 1996 Act. *See* App. 331a-332a (¶¶ 261-263).

The Commission likewise found that CLECs are not impaired without access to the next-generation fiber to the home (or "FTTH") facilities that can support a broad range of broadband technologies including video-on-demand and high-speed data transmission. *See* App. 342a (¶ 273). The FCC concluded that these facilities were just beginning to be deployed and that ILECs had no inherent advantage over

CLECs in being able to bring these new technologies to consumers. *See* App. 343a-345a, 349a (¶¶ 274-275, 279) ("competive LECs have demonstrated that they can deploy FTTH loops and are doing so"). The Commission further explained that, because § 251(d)(2) specifies that impairment is a "minimum" prerequisite for unbundling and because § 706 of the 1996 Act requires the Commission to "encourage the deployment . . . of advanced telecommunications capability to all Americans," its judgment was necessarily "informed" by its finding that requiring unbundling would create disincentives for investment in this new technology. *See* App. 341a-342a, 348a (¶¶ 272, 278). The FCC did require, however, that, where an ILEC deploys fiber to the home to existing customer locations, it must make available a narrowband voice channel to CLECs over either an existing copper facility or the new fiber. *See* App. 346a (¶ 277).

Finally, with respect to hybrid loops (that is, those containing both fiber and copper), the Commission found some limited impairment, but balanced against that finding (1) its conclusion that alternative unbundling requirements offer suitable alternatives that "adequately address[]" whatever limited impairment may exist, (2) the effect of unbundling on facilities investment, and (3) the existence of intermodal alternatives for consumers and the fact that "broadband services . . . are currently provided in a competitive environment" in which cable companies have "a leading position." App. 353a-354a, 357a-360a (¶¶ 286, 291-292). Given these factors, the Commission determined that limited unbundling was appropriate: ILECs would be required to provide a narrowband transmission path to CLECs, but not to turn broadband capabilities over to their competitors. App. 362a-363a (¶¶ 295-296).

5. On review, the D.C. Circuit (Williams, J., joined by Edwards and Randolph, JJ.) again unanimously vacated the FCC's rule re-imposing blanket unbundling of narrowband facilities, but affirmed the FCC's rule imposing limited unbundling of broadband facilities.

The D.C. Circuit vacated the FCC's narrowband unbundling determinations for several independent reasons. First, the court held that it was inconsistent with Congress's explicit assignment of unbundling authority to the FCC for the federal agency to subdelegate its responsibility for final unbundling decisions to state agencies that are not accountable to federal authorities. *See* App. 9a-16a. The court noted that the FCC itself "acknowledge[d]" that, in § 251(d)(2), Congress "instruct[ed]" the *federal agency*, not the state commissions, to "'determin[e]' which network elements shall be made available to CLECs on an unbundled basis." App. 9a (quoting 47 U.S.C. § 251(d)(2)). In light of that express congressional assignment, the FCC had a statutory duty to make the ultimate unbundling determinations, and there was no presumption that the FCC could subdelegate that duty to the states. *See* App. 10a.

Independent of this delegation issue, the D.C. Circuit concluded that the FCC's Order suffered from multiple failures of reasoned decisionmaking. *See* App. 16a-32a. The court concluded, for example, that the FCC's prior approvals of ILEC hot-cut processes created substantial "doubt that the record supports a national impairment finding for mass market switches" on this basis. App. 18a. In addition, the FCC had not "articulated any reasonable explanation" for rejecting more tailored alternatives to switch unbundling that commenters had raised and that would appear to have resolved any supposed hot-cut difficulties. App. 20a-21a. Similarly, the court concluded that the FCC had violated basic precepts of administrative rationality in "simply ignor[ing] facilities deployment along similar routes" in requiring transport and high-capacity loops to be unbundled. App. 28a (agency had failed to "explain" this conclusion). The FCC's Order also "ma[de] no attempt" to explain how it was consistent with the "purposes of the Act" to base an impairment determination on a finding that state-regulated retail rates were too low to permit profitable entry. App. 24a. Finally, the FCC's impairment inquiry had failed to "consider" the fact that, in cer-

tain instances, CLECs were competing successfully using incumbent facilities obtained under tariffs. App. 31a-32a.

As to the FCC's decision to limit unbundling of broadband facilities, the D.C. Circuit found that the FCC had acted rationally based on the record evidence before it as to each of these issues and had relied on a permissible understanding of the statute. The court held that the FCC had "reasonably" understood the statute to permit the agency to consider the investment-dampening effects of unbundling and the fact that alternative unbundling requirements would "mitigate" any CLEC impairment. App. 35a-42a. The court concluded that the FCC's decision on FTTH loops was sufficiently "buttressed by the evidence in the record" as to investment effects and thus found it unnecessary to decide whether the record also supported the FCC's no-impairment conclusion. App. 43a-44a. The court also held that the FCC reasonably concluded that "line sharing is not essential to maintain robust competition in this market, a conclusion based on permissible considerations and supported by evidence in the record." App. 46a-47a. Finally, the court agreed with the Commission's conclusion, "supported by very strong record evidence," that the broadband market is characterized by "robust intermodal competition from cable providers" and that imposing unbundling obligations on ILECs, the secondary players in that market, is not warranted given that "intermodal competition from cable ensures the persistence of substantial competition." App. 41a, 47a.

On May 24, 2004, the FCC majority (but not the United States), joined by the CLECs and the state commissions, asked the D.C. Circuit to stay its mandate pending the filing and disposition of petitions for certiorari. On June 4, 2004, the D.C. Circuit unanimously denied the stay motions.

On June 9, the Solicitor General announced that he would not seek either a stay of the D.C. Circuit's mandate or a writ of certiorari from this Court, although he authorized the FCC

to proceed in its own name if it so chose.[9] The FCC, however, likewise decided not to seek review of the D.C. Circuit's decision, electing instead to proceed to adopt new rules.[10]

On June 10, 2004, NARUC and the same CLECs that now seek certiorari filed applications with the Chief Justice seeking a stay of the D.C. Circuit mandate. On June 14, the Chief Justice denied those applications.

6. On August 20, 2004, the FCC adopted interim rules to govern narrowband unbundling and issued a *Notice of Proposed Rulemaking* seeking comments on permanent rules. The interim rules will be in effect for six months.[11] The FCC has scheduled a meeting to adopt permanent new rules on December 15, 2004.

REASONS FOR DENYING THE PETITIONS

I. THE D.C. CIRCUIT'S INVALIDATION OF THE FCC'S REIMPOSITION OF BLANKET NARROWBAND UNBUNDLING DOES NOT MERIT REVIEW

The D.C. Circuit's decision vacating the FCC's imposition of unbundling requirements for mass-market switching and high-capacity facilities is correct, is consistent with this Court's precedents, and conflicts with no decision of any other court of appeals. Plenary review is not warranted.

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[9] Press Release, FCC, *Office of Solicitor General Will Not Appeal DC Circuit Decision* (June 9, 2004); *Solicitor General Authorizes FCC To Represent Itself in Appeal*, Reuters (June 9, 2004).

[10] Press Release, FCC, *FCC Chairman Michael K. Powell Announces Plans for Local Telephone Competition Rules* (June 14, 2004).

[11] Because the FCC's interim rules, in effect, merely reinstate the blanket unbundling rules struck down previously by this Court and twice by the D.C. Circuit, they amount to a self-granted stay of the D.C. Circuit's mandate, a stay that both the D.C. Circuit and this Court declined to grant. Accordingly, some of the respondents have filed a petition for a writ of mandamus with the D.C. Circuit seeking to have the interim rules vacated. That petition is pending.

A. Although petitioners claim that the decision below will significantly impede the FCC's administration of the 1996 Act, both the Solicitor General and the FCC have reached a different judgment and have decided *not* to seek review of the decision themselves. If neither the federal agency charged with administering the 1996 Act nor the government's chief representative in this Court believes that the effect of the court of appeals' decision is sufficiently deleterious to warrant filing a petition for a writ of certiorari, there is no reason for this Court to grant plenary review at the behest of other parties. As noted above, AT&T, a petitioner here, has itself argued in an analogous context that there "is no cause for this Court" to grant review where an agency has declined to seek certiorari from a circuit court decision vacating the agency's rules.[12]

That analysis is correct, and it is dispositive of the petitioners' contrary arguments here. If the D.C. Circuit's decision in fact "reversed the basic premise of the [1996] Act," "immensely complicate[d] the task" before the FCC, or required determinations that the FCC "cannot possibly make," NARUC Pet. 22, 24, 25, surely the FCC and the United States would have sought review in this Court. Instead, they decided against filing a certiorari petition, and the FCC, as discussed further below, has initiated a proceeding to adopt new rules that comply with the D.C. Circuit's mandate by the end of the year.[13]

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[12] Br. in Opp. for Time Warner Entertainment Co./AT&T Corp. at 12, *Consumer Fed'n of Am. v. FCC*, No. 01-223 (U.S. filed Nov. 2, 2001).

[13] In this regard, petitioners are wrong to suggest that the court of appeals has required the FCC, on remand, to make "hundreds of thousands of discrete judgments" as to the particular circumstances in individual markets. NARUC Pet. 24. As the FCC has already acknowledged (*see* App. 204a (¶ 121)), the 1996 Act and the D.C. Circuit's decisions simply require the Commission to draw reasonable lines determining the classes of markets that are suitable for competitive supply.

Indeed, we are aware of *no* analogous case (and petitioners have cited none) in which this Court granted certiorari to review a lower court decision striking down an agency rule despite the fact that the agency itself chose not to seek review. In *Verizon*, for example, the Court granted certiorari limited to the questions presented by the government and declined review of other questions on which the government lost below and that were presented only by AT&T and WorldCom.[14] The Court declined plenary review of those questions even though the Solicitor General, on behalf of the United States and the FCC as respondents, urged the Court to grant review.[15] Similarly, the Court denied the request of AT&T and other CLECs to review the D.C. Circuit's decision in *USTA I* after the FCC and the United States declined to petition for certiorari from that decision. *See* 538 U.S. 940 (2003) (No. 02-858).

B. There is even less reason to grant plenary review where, as here, the responsible agency has stated that it intends to adopt new rules by the end of this year to replace those that the D.C. Circuit vacated. *See supra* pp. 1, 13. As the Solicitor General previously explained in similar circumstances, the impending issuance of new rules means that review by this Court is "not necessary" and "would not be an efficient use of judicial or agency resources."[16]

C. Even apart from these considerations, there is no basis for plenary review of the D.C. Circuit's judgment.

1. NARUC's lead argument rests on the following unlikely proposition: when Congress enacts a statute (or at least a statute with some elements of "cooperative federal-

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[14] Petition for a Writ of Certiorari at 21-24, *AT&T Corp. v. Iowa Utils. Bd.*, No. 00-590 (U.S. filed Oct. 13, 2000); *AT&T Corp. v. Iowa Utils. Bd.*, 531 U.S. 1124 (2001) (No. 00-590).

[15] Br. for FCC and United States at 16-21, *Verizon Communications, Inc. v. FCC*, Nos. 00-511 *et al.* (U.S. filed Nov. 17, 2000).

[16] Br. for Fed. Resp. at 14, 16-17, *WorldCom, Inc. v. USTA*, No. 02-858 (U.S. filed Feb. 5, 2003).

ism") specifically assigning certain tasks to a federal agency, that agency is nonetheless free to abdicate its congressionally assigned responsibilities and delegate ultimate decision-making authority instead to 51 separate state agencies. *See* NARUC Pet. 15-21; *see also* AT&T Pet. 28-30. That remarkable view finds no support in the precedent of this or any other federal court. The D.C. Circuit's decision to reject it is correct and does not raise a significant question meriting this Court's review.

As this Court has explained, the 1996 Act creates a "*federal* regime" governing local telecommunications competition and, as to the matters it covers, takes the "regulation of local telecommunications competition away from the States." *IUB*, 525 U.S. at 378 n.6; *see id.* (a federal regime "administered by 50 independent state agencies" would be "surpassing strange"); *id.* at 385 n.10 ("we are aware of no . . . instances in which federal policymaking has been turned over to state administrative agencies").

The federal nature of this new regime is particularly clear in the unbundling provisions at issue here. Congress explicitly assigned to a single federal agency, not to state commissions, the obligation to decide which facilities should be unbundled under the 1996 Act. As the D.C. Circuit explained, § 251(d)(2) requires that the *FCC* "'determin[e]' which network elements shall be made available to CLECs on an unbundled basis." App. 9a (quoting § 251(d)(2)). Moreover, Congress required the FCC to adopt any necessary unbundling obligations within six months of the statute's enactment, *see* § 251(d)(1), in time for the state commissions to apply those binding determinations in arbitration proceedings, which have a nine-month deadline, *see* § 252(b)(4)(C). In those arbitrations, state commissions are required to adhere to "the regulations prescribed by the [FCC] pursuant to section 251," § 252(c)(1), including the unbundling determinations that the FCC is required to make under § 251(d).

For these reasons, the FCC itself concluded that Congress "direct[ed] the *Commission* to perform" the "analysis required to determine what network elements should be made available." App. 259a (¶ 179) (emphasis added). By contrast, the FCC explained, the 1996 Act gave the states *no* power to determine the facilities that should or should not be unbundled: "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations," App. 264a (¶ 187); *compare* NARUC Pet. 18 (stating incorrectly, and in conflict with the FCC's own position, that the federal statute grants unbundling authority to the states).[17]

By vacating the FCC's purported delegation of ultimate unbundling authority, the D.C. Circuit simply held that the 1996 Act means what it says when it assigns unbundling duties to the FCC, and that there is no "presumption" that a federal agency assigned a task by Congress may cede that duty to an instrumentality of a separate sovereign. *See* App. 10a. On the contrary, as the D.C. Circuit explained, "when an agency delegates power to outside parties" — particularly, as in this case, to separate sovereigns outside the federal system of checks and balances — "lines of accountability may blur, undermining an important democratic check on government decision-making" and "aggravat[ing] the risk" that the policy goals reflected in the "underlying statutory scheme" will remain unfulfilled. App. 10a-11a (citing *Printz v. United States*, 521 U.S. 898, 922-23 (1997)).

In challenging that conclusion, petitioners rely almost exclusively on two cases, *Batterton v. Francis*, 432 U.S. 416 (1977), and *Wisconsin Department of Health & Family Services v. Blumer*, 534 U.S. 473 (2002). They wrongly assert that these cases — which no party even cited in merits

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[17] The unbundling provisions of the 1996 Act stand in marked contrast to other statutory sections, such as § 252(d), that expressly assign *other* statutory "determinations" to the states. *See* App. 15a-16a (noting that, although "other provisions of the statute carefully delineate a particular role for the state commissions," the unbundling provisions "do[] not").

briefing before the D.C. Circuit — are controlling on this issue and "conflict[]" with the court of appeals' ruling. *See* NARUC Pet. 18. In neither case did the federal agency purport, as the FCC did here, to delegate to the states a responsibility that Congress expressly assigned to it, much less did the Court establish the broad presumption that petitioners champion.

In *Batterton*, the relevant statute made certain governmental benefits turn on a state's decision that a child had been deprived of parental support because of "'the unemployment (as determined in accordance with *standards* prescribed by the Secretary)'" of the child's parent. 432 U.S. at 418 n.2 (quoting 42 U.S.C. § 607(a)) (emphasis added). The statute thus anticipated that "the power to 'determine' unemployment [would] remain[] with the States," and that the Secretary would merely adopt relevant "standards" for the states to use. *Id.* at 430. The Secretary did precisely what the statute required of him. He created the relevant standards, which allowed the states some leeway to determine whether particular individuals were unemployed. The Court accordingly held that the Secretary had fulfilled his statutory duty. *See id.* ("we conclude that the power to prescribe 'standards' gives the Secretary sufficient flexibility to recognize some local options").

The Court's result turned, therefore, on the *specific terms of the statute*, which required limited action by the Secretary — action that the Secretary had carried out — and reserved for the states the duty to "determine" whether the parent was unemployed. The Court specifically emphasized that if, instead of requiring the Secretary simply to adopt standards governing unemployment, Congress had said that unemployment must be "defined by the Secretary," the statute would have required the Secretary to make a specific determination and would have "*preclud[ed]*" any contrary local policies. *Id.* (emphasis added).

The circumstances here perfectly fit the hypothetical that *Batterton* distinguished. In contrast to *Batterton*, where Congress asked the states to make the relevant "determin[ations]," the 1996 Act expressly requires *the FCC* to "determin[e]" what UNEs must be made available, as the FCC has correctly acknowledged. *See* 47 U.S.C. § 251(d)(2); *see also* App. 9a; App. 259a, 264a (¶¶ 179, 187). And, unlike the Secretary in *Batterton*, the FCC did not even arguably do what the statute required of it. Instead, it expressly shifted to the states the functions that Congress assigned to the FCC in § 251(d)(2). *See, e.g.*, App. 265a-268a (¶¶ 188-190). Far from approving of such a result, *Batterton* makes clear that, where Congress directs a federal agency to do something (whether to define "unemployment" or to determine which network elements must be made available), it is that federal body, not 51 separate states agencies, that must carry out the responsibility.

Petitioners' reliance on *Blumer* is similarly misplaced. There, the federal program required the states to establish plans for implementing a certain Medicaid program and to do so in accordance with federal regulations. *See* 534 U.S. at 479. The Secretary had indicated that, with respect to a technical issue (involving the allocation of income between spouses for purposes of program eligibility), states could legitimately employ more than one methodology because the statute did not "'clearly requir[e]'" the use of a single mechanism. *Id.* at 484-85 (quoting 66 Fed. Reg. 46763, 46767 (2001)) (alteration in original). *Blumer* held only that the methodology used in one state (Wisconsin) was not inconsistent with the statutory language, *see id.* at 489-95, and noted in dicta that, as the Secretary had suggested, other approaches might be consistent as well, *see id.* at 495 (not "definitively resolv[ing] th[e] matter" but noting that such "leeway" was "characteristic of Medicaid").

Again, *Blumer* does not suggest that the Secretary could ignore a statutory directive to take a specific action. On the contrary, the Court stressed that the relevant statute allowed

each state to "strike its own balance in the implementation of the Act," *id.* at 497 (internal quotation marks, brackets omitted), a sharp contrast to the unbundling provisions of the 1996 Act, which, the FCC itself has stated, "direct[]" the FCC to perform the relevant task. App. 259a (¶ 179).

There is also no basis for the claim, raised by NARUC alone, that the D.C. Circuit's decision conflicts with two Ninth Circuit decisions. The D.C. Circuit fully explained why one of those cases, *Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550 (9th Cir. 1983), does not support the FCC's subdelegation theory. *See* App. 13a. The Ninth Circuit specifically concluded that in the relevant statutes *Congress* had authorized the federal agency to precondition federal grants of rights-of-way through Indian reservations on tribal consent, so, unlike here, there was no issue of an agency delegating to another sovereign a responsibility that Congress had not authorized the agency to delegate. *See* 700 F.2d at 554. Moreover, the Ninth Circuit made plain that the federal agency there was not "relinquish[ing] . . . [its] final authority to approve" the right-of-way applications. *Id.* at 556; *see* App. 13a. Again, that is in marked contrast to this case, where the FCC has authorized states to make final unbundling decisions that will become effective without any review by the FCC. *See* App. 13a, 15a.

In the other case, *Vierra v. Rubin*, 915 F.2d 1372 (9th Cir. 1990), the Ninth Circuit found that the state's actions were inconsistent with the statute, rendering immaterial the question whether states could ever exercise the authority at issue. *See id.* at 1378. Even in dicta, the Ninth Circuit said only that the agency's delegation to the states of the authority to define a statutory term was "not impermissible per se" in light of the "breadth of discretion granted to states" by Congress in the AFDC program. *Id.* at 1377-78 (internal quotation marks omitted). Here, Congress did not grant broad discretion to the states with respect to unbundling, but instead specifically assigned that responsibility to the FCC.

2. Even if there were substance to petitioners' attack on the D.C. Circuit's delegation decision, that argument alone would not be a basis for reinstating the FCC's rules. Rather, this Court would also be required to review and reverse the D.C. Circuit's ordinary administrative-law determinations that the FCC's rules were arbitrary, insufficiently explained, and/or contrary to the statute. These include the D.C. Circuit's finding that the FCC failed to reconcile its prior approvals of ILEC hot-cut processes, to consider narrower alternatives to unbundling (such as rolling hot cuts) that had been raised in the record, to explain how lack of CLEC entry in markets with below-cost retail rates can be understood to result from "impairment," to draw any rational inferences from the ability of carriers to deploy facilities on similar routes for high-capacity facilities, and to consider the fact that carriers already were successfully providing high-capacity services without access to UNEs by using tariffed services instead. *See* App. 19a-21a, 27a-32a. Those decisions involve applications of settled principles of administrative law, and there is no reason for this Court to grant review as to them. *See generally Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91 (1951) (lower courts should determine whether agency determinations are supported by the record created in a particular case, and this Court's power to review "ought seldom to be called into action").

In arguing to the contrary, petitioners assert that, for years, the D.C. Circuit has been disregarding binding precedent from this Court interpreting the 1996 Act. In particular, they claim that the D.C. Circuit's decisions here and in *USTA I* are inconsistent with *IUB* and *Verizon*, both of which predate those court of appeals decisions and which the court of appeals has in fact considered at length. *See, e.g., USTA I*, 290 F.3d at 424-29.

That argument lacks substance. Petitioners wrongly assert that this Court's decisions compel federal courts to rubber-stamp essentially any unbundling regime the FCC adopts, no matter how extreme the result or how arbitrary or un-

explained the agency's reasoning. *See* AT&T Pet. 22-25. But far from deferring to the FCC's views on these issues, this Court *vacated* the FCC's unbundling rules in *IUB*. 525 U.S. at 397; *compare* AT&T Pet. i, 2 (suggesting wrongly that the D.C. Circuit's decisions are grounded in conclusions adopted only by Justice Breyer). The Court did so because, among other things, the FCC did not consider whether CLECs could obtain facilities from sources other than the ILEC and because the FCC's decision did not impose a "*limiting* standard" that was "rationally related to the goals of the Act." 525 U.S at 388-89 (emphasis added). Thus, although the Court did determine that the 1996 Act can be read to give CLECs "most promiscuous rights" in *other* respects, *id.* at 397, the Court emphasized (in the very same paragraph) that § 251(d)(2) placed "clear limits" on the FCC's authority with respect to unbundling, *id.*

Although petitioners disparage the D.C. Circuit's insistence that impairment findings must be based on appropriate geographic and product markets, *see* AT&T Pet. 25-26, that conclusion follows directly from this Court's judgment that the Commission could not "blind itself to the availability of elements outside the incumbent's network." *IUB*, 525 U.S. at 389. As we discussed above, *see supra* p.2, one cannot rationally determine whether alternative facilities are, or reasonably can be made, "available" outside the network without reference to a relevant market. *See* App. 27a ("Any process of inferring impairment (or its absence) from levels of deployment depends on a sensible definition of the markets in which deployment is counted."). Thus, far from imposing an "extra-statutory" requirement, *see* AT&T Pet. i, 7,[18]

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[18] Contrary to AT&T's claim, the D.C. Circuit did not hold that it was "not enough that the FCC was 'adhering' to a permissible construction of the 'letter' of § 251(d)(2)." AT&T Pet. 24 (quoting *USTA I*, 290 F.3d at 429). Rather, the court in *USTA I* found the FCC's claim that it was adhering to the statute by considering only one technology used to offer broadband service — and ignoring other competing technologies — to be

the D.C. Circuit's determination is firmly rooted in this Court's authoritative interpretation of the text of the 1996 Act.

Beyond this, petitioners are simply mistaken in contending that this Court has embraced unrestrained unbundling. *See* AT&T Pet. 24-26. As noted, *IUB* vacated the FCC's initial rules precisely because, if Congress had intended to authorize "blanket" and "unrestricted" access to UNEs, "it would not have included § 251(d)(2) in the statute at all." 525 U.S. at 390. *Verizon* likewise establishes that UNE availability is properly limited to true "*bottleneck*" facilities in order to enable facilities-based competition in other, more-easily duplicated facilities. The Court thus explained that "competition as to 'unshared' elements may, in many cases, only be possible if incumbents simultaneously share with entrants some costly-to-duplicate elements . . . . In this case, low prices for the elements to be leased become crucial in inducing the competitor to enter and build." 535 U.S at 510 n.27; *see id.* at 502 n.20.

Furthermore, nothing in this Court's decisions precludes the D.C. Circuit from undertaking its ordinary function of reviewing the FCC's determinations to ensure that they are adequately reasoned. That is the everyday work of the D.C. Circuit, and there is no reason for this Court to review the D.C. Circuit's case-specific application of settled principles of administrative law.

For example, the D.C. Circuit's conclusion that the FCC had not "articulated any reasonable explanation" for rejecting more tailored alternatives to switch unbundling, App. 20a-21a, is the sort of decision that courts of appeals make routinely in cases where an agency's decision does not provide a rational basis for its conclusion. Although AT&T (at 26) again wrongly derides the D.C. Circuit's decision as "extra-

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"quite unreasonable" and thus unsustainable under *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). *See* 290 F.3d at 429.

statutory," this Court has long established that agencies may not simply ignore reasonable alternatives that were raised by parties to the agency proceeding and that would serve the purposes of the relevant statute. *See, e.g., Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) ("At the very least this alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment."). Given the FCC's own recognition that "unbundling is one of the most intrusive forms of economic regulation" and "one of the most difficult to administer," App. 223a (¶ 141), it was hardly inconsistent with established principles of administrative law or with the decisions of this Court to require the FCC to consider alternatives that would obtain the same benefits as unrestricted unbundling without the same costs.

The D.C. Circuit's similar conclusion that the FCC must "consider[]" the availability of tariffed alternatives to UNEs, App. 31a-32a, again flows from this Court's decisions — which, as noted, indicate that unbundling is not to be applied where CLECs have competed successfully using facilities derived through alternative means. *See IUB*, 525 U.S. at 389-90 & n.11 (explaining that, even if there is a difference in cost, CLECs are not "impaired" within the meaning of the statute so long as they can still compete using alternative facilities). In arguing otherwise, AT&T simply disregards this Court's holding on that point. *See* AT&T Pet. 26-27.[19]

Finally, the D.C. Circuit's conclusion that the FCC failed to provide any explanation "connect[ing]" the existence of

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[19] AT&T wrongly claims (at 27) that the Eighth Circuit decided an indistinguishable issue in *Iowa Utilities Board v. FCC*, 120 F.3d 753, 809 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). But, as the D.C. Circuit properly understood, the Eighth Circuit's discussion dealt with the definition of a "network element," not the distinct question of the proper impairment inquiry (an issue on which this Court reversed the Eighth Circuit). *See* App. 31a.

below-cost retail prices to "impairment" or the "purposes of the Act," App. 24a, not only follows directly from this Court's statements that a proper unbundling standard must further the goals of the Act, *see IUB*, 525 U.S. at 388, but also simply requires the sort of rational agency analysis and explanation that courts routinely demand of agencies. Simply put, the D.C. Circuit required the FCC to explain why it was reasonable and consistent with statutory purposes to mandate unbundling on the theory that CLECs are impaired, not because they cannot reasonably duplicate the facilities at issue, but because state-regulated retail rates are artificially low. *See* App. 24a-25a (explaining that the FCC has "said nothing" that "locate[s] its treatment of th[is] issue in any purposeful reading of the Act"). AT&T's petition does not explain why such an ordinary administrative-law determination merits review, particularly when the court of appeals merely insisted on compliance with this Court's own conclusion that a proper impairment standard must accord with the purposes of the Act.

II. THE D.C. CIRCUIT'S AFFIRMANCE OF THE FCC'S DECISION LIMITING UNBUNDLING OF COMPETITIVE BROADBAND FACILITIES DOES NOT MERIT REVIEW

Petitioners also take issue with the D.C. Circuit's affirmance of the FCC's decision to require only limited unbundling of the facilities ILECs use to provide service in the highly competitive market for broadband services. They again present no issue warranting plenary review.

A. As an initial matter, it is important to understand that, contrary to the impression the petitions seek to leave, the FCC found that CLECs were *not* impaired without UNE access to most of the broadband facilities at issue here. *See* App. 327a-330a (¶¶ 258-260) (line sharing), 342a-346a (¶¶ 273-276) (FTTH loops). And, in the one instance where the FCC found that some limited impairment may exist (hybrid loops), it concluded, among other things, that access to

alternative facilities "adequately addresses the impairment that competitive LECs face," App. 357a (¶ 291), and it still imposed some unbundling obligations to allow CLECs to obtain access to transmission facilities for traditional narrowband voice calls, *see* App. 353a (¶ 286).

These discrete record-based determinations do not merit review by this Court. In each instance, the FCC weighed the evidence of impairment and found, based on its review of the record, either that impairment did not exist or that it could be addressed through alternative arrangements and limited unbundling requirements. Furthermore, the FCC reasonably concluded that the competitive context — including the dominant market position of cable providers as well as alternative providers such as fixed wireless — ensured that consumers would continue to benefit from robust competition without unbundling, in which case there is no basis for imposing the costs of mandatory access to ILEC facilities. There is no reason for the Court to grant review as to such case-specific technical determinations involving application of the impairment standard to specific kinds of facilities.

B. In addition to its impairment findings, the FCC *also* concluded that requiring unbundling of these broadband facilities would discourage facilities-based competition, in conflict with the core goals of the 1996 Act and the specific congressional intent reflected in § 706 of the 1996 Act, which by its terms requires the Commission to take actions that promote deployment of advanced telecommunications capabilities. *See* 47 U.S.C. § 157 note (Commission "shall encourage the deployment ... of advanced telecommunications capability ... by utilizing ... measures that promote competition in the local telecommunications market[] or other regulating methods that remove barriers to infrastructure investment"). Because § 251(d)(2) makes impairment a "minimum" consideration, the FCC reasonably interpreted the statute to, at the least, permit it to consider the congressional policy in favor of facilities deployment set forth in § 706 in determining whether facilities should be unbundled.

See App. 249a-250a (¶ 173). The Commission concluded that Congress's goal of encouraging facilities deployment further weighed against mandating unbundling of specific broadband facilities. *See, e.g.*, App. 348a (¶ 278).

Thus, contrary to AT&T's claim, to the extent that investment incentives provided a justification to limit broadband unbundling, that is because the FCC, *not* the D.C. Circuit, reasonably interpreted the statute to authorize consideration of that issue. *Compare* AT&T Pet. 15-22 (discussing this issue in terms of the "holding[s]" and "conclu[sions]" of the "D.C. Circuit" and disregarding the FCC findings that the D.C. Circuit affirmed) *with* App. 35a-37a (affirming *the FCC's* interpretation as "reasonabl[e]"). The D.C. Circuit's conclusion that the FCC properly read the "at a minimum" clause of § 252 together with § 706 to authorize consideration of effects on facilities-based competition thus involves the application of standard *Chevron* principles and does not warrant review.

Nor is there any plausible claim that the D.C. Circuit, in affirming the FCC's reading of the statute, disregarded this Court's decisions in *IUB* and *Verizon*. *Compare* AT&T Pet. 16-19; *see also* Cal. Pet. 17-19. Neither of those cases involved the distinct policy issues raised by unbundling of the new high-speed broadband facilities in which both ILECs and CLECs are investing today (as opposed to legacy voice-only facilities). Thus, neither case involved application of § 706 and the interplay between that provision and the "at a minimum" language in § 251(d)(2). Moreover, in this case, the FCC has itself concluded, based on substantial evidence in the record, that requiring unbundling of these next-generation facilities will impede investment. *See, e.g.*, App. 348a-349a (¶ 278 & n.818) (noting record statements that declining to require unbundling would increase investment in next-generation fiber to the home by more than 600%). *Verizon* does not establish that the FCC may not reasonably limit unbundling where it finds that to be the case.

Indeed, even AT&T ultimately acknowledges that it is not arguing that "investment cannot be considered by the FCC in making unbundling determinations," AT&T Pet. 19, but rather is arguing only that such effects cannot be "presumed to result . . . or treated as established on the basis of vague 'suggestions' and speculation," *id.* In the end, therefore, AT&T's argument is limited to whether the FCC's case-specific conclusions about the effect of unbundling on investment in next-generation facilities were supported by substantial evidence. Not only is AT&T wrong for the specific reasons identified by the D.C. Circuit in rejecting these record-based claims, *see, e.g.*, App. 39a-42a, but also its argument presents a classic fact-bound issue that does not merit review by this Court. *See Universal Camera, supra.*

Finally, contrary to AT&T's lengthy argument, it is incorrect to say that the FCC's decision presents any issue of "'balanc[ing]' the benefits of greater competition against . . . diminished investment and innovation." AT&T Pet. 16. In concluding that CLECs are not impaired without these facilities (or could remedy any impairment through access to other facilities and limited unbundling), the FCC reasoned that CLECs could compete without the particular UNEs at issue and thus that there was *no* trade-off to be made. And the FCC highlighted the existence of intermodal alternatives that are not dependent on UNEs precisely because those alternatives ensure that consumers will get the benefits of competitive choice regardless of whether facilities are unbundled. *See, e.g.*, App. 332a (¶ 263). AT&T may disagree with the FCC's (and the D.C. Circuit's) analysis of the evidence — evidence showing that a *majority* of broadband consumers in fact rely upon intermodal choices such as cable modem, App. 331a (¶ 262 & n.777) — but that does not mean that the FCC was unconcerned about competition or that its evaluation of this evidence merits review by this Court.[20]

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[20] California argues (at 14-16) that the Court should review the FCC's determinations regarding line sharing and hybrid loops because they are

III. PETITIONERS' ADDITIONAL ARGUMENTS ARE EQUALLY INSUBSTANTIAL

A. Both California (at 20-23) and NARUC (at 29-30) take issue with the FCC's conclusion that the federal agency, not the states, has jurisdiction to determine rates for facilities that Bell Operating Companies must make available under § 271, but that are not subject to unbundling under § 251(c)(3).

Although these parties rest their arguments on the state commissions' § 252 authority to arbitrate pricing disputes subject to federal-court review, *see, e.g.*, NARUC Pet. 29, the statute makes clear that state pricing authority under § 252 is limited to facilities that must be unbundled under § 251(c)(3). *See* 47 U.S.C. § 252(d)(1) (giving state commissions authority to determine rates for network elements "for purposes of [§ 251(c)(3)]"). It is equally clear that Congress gave the FCC, not state commissions, sole authority to implement and enforce § 271. *See id.* § 271(d)(3), (6)(A). For these reasons, petitioners' arguments about the allegedly broad scope of state authority under § 252 are irrelevant: the specific requirements of §§ 251 and 252 simply do not apply when a facility must be made available only as a result of § 271. *See* App. 54a (concluding that there is "no serious argument" that the "§ 251 pricing rules apply to unbundling pursuant to § 271"). In any event, neither this Court nor any other court of appeals has reached a different conclusion on this § 271 issue, and there is no other reason for the Court to review the

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allegedly "arbitrary and capricious" and because the FCC supposedly overstated the significance of widespread cable deployment. There is no reason for the Court to wade into such record-based issues, but in any case California's arguments are unpersuasive and do not overcome the deference to which the FCC is entitled on such issues. For instance, California does not dispute that, as noted in the text, cable modem is by far the market-leading technology. And, even in California, the FCC's statistics demonstrate that there are two or more broadband providers in 92% of zip codes. *See* Indus. Anal. & Tech. Div., Wireline Competition Bureau, FCC, *High-Speed Services for Internet Access: Status as of December 31, 2003*, at Table 13 (June 2004).

FCC's sensible resolution of this specific question of statutory interpretation.

B. Contrary to California's argument, there is also no reason for the Court to review the FCC's decision to establish a methodology for setting rates during the transition period when ILECs must still make line sharing available. *See* Cal. Pet. 20-23. As the FCC explained, because line sharing is no longer required under § 251, the FCC employed its general rulemaking authority under § 201 of the Communications Act to establish requirements for this transitional period. *See* App. 338a (¶ 267). State authority to set rates under § 252 is thus again irrelevant. Additionally, even if § 252 applied, this Court has held that the FCC has authority to establish a pricing methodology governing state action under that provision, *see IUB*, 525 U.S. at 384-85, and that is all the FCC has done here. *See* App. 336a (¶ 265). Finally, and in any event, because this issue involves only a transitional mechanism that will expire in 2006 and that governs access to a single facility, it does not raise an issue meriting review.

C. California challenges the FCC's analysis of state authority to require unbundling of network elements under state law in circumstances where the FCC has found that federal law does not require such unbundling. *See* Cal. Pet. 23-28; App. 272a (¶ 195). But the D.C. Circuit concluded that this issue was not ripe because the FCC "has not taken any view on any attempted state unbundling order." App. 63a. The D.C. Circuit applied standard two-pronged ripeness analysis, *see* App. 63a-64a; *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 151 (1967), and California does not explain why the D.C. Circuit's application of those established principles to this case merits review. Nor does California claim that the court of appeals' ripeness decision conflicts with any ruling of this Court or of any other court of appeals. It has thus provided no reason to grant plenary review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

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In The Supreme Court of the United States

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE CALIFORNIA PUBLIC UTILITIES COMMISSION,

Petitioners,

v.

UNITED STATES TELECOM ASSOCIATION, *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
ARGUMENT	2
I. SWIFT ACTION ON THE PART OF THIS COURT IS NEEDED TO STOP THE HEMORRHAGING OF THE ONCE COMPETITIVE TELECOMMUNICATIONS MARKETPLACE...	2
II. THE SOLICITOR GENERAL INACCURATELY STATES THAT BECAUSE NO PARTY RAISED THE ISSUE OF PREEMPTION OF STATE AUTHORITY TO SET LINE-SHARING RATES BEFORE THE FCC, THE ISSUE CANNOT BE RAISED ON JUDICIAL REVIEW OF THE *TRO*	9
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999) 2, 9

United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) Pets. *for cert. filed*, Nos. 04-12, 04-15, 04-18 (June 30, 2004). *See also United States Telecom Ass'n v. FCC*, No. 00-1012 (D.C. Cir. Apr. 13, 2004) (granting a stay of the court's mandate through June 15, 2004) 1, 6, 7, 8, 9, 10

USTA v. FCC (No. 00-1012) (D.C. Cir. 2004) 8

Verizon Communications v. FCC, 535 U.S. 467 (2002) 2, 9

Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, 124 S.Ct. 872 (2004) 2, 9

STATUTES

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) 1

47 U.S.C. §157 (§706(c), *codified in* notes to this section) 4

47 U.S.C. §251 1

47 U.S.C. §251(c)(3) 7

47 U.S.C. §252 1

47 U.S.C. §405 10

TABLE OF AUTHORITIES – Continued

Page

ADMINISTRATIVE DECISIONS/REGULATIONS

In re Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 F.C.C.R. 16798 (2003), corrected by *Errata*, 18 F.C.C.R. 19020 (2003), 18 F.C.C.R 19020 (2003) ...*passim*

In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order and Notice of Proposed Rulemaking, CC Docket No. 01-338 ..... 5, 7, 8

OTHER MATERIAL

UNE-P Benefits Update: SBC's California Territory, 2004, Yale M. Braunstein, School of Information Management Systems, University of California, Berkeley (May 2004) 3

CompTel/Ascent Analysis (January 28, 2004)..... 3

TR Daily, June 23, 2004..... 4

FCC Press Release, *Statement of FCC Commissioners Michael J. Copps, Kevin J. Martin, and Jonathan S. Adelstein on the D.C. Circuit's Decision to Eliminate the FCC's Rule*, March 3, 2004..... 6

MCI Posts $71 Million Loss, Has Plan For Cash, Business Section, Washington Post, August 6, 2004 5

Federal Communications Commission's Reply to Opposition of the ILEC Petitioners to Motion to Stay the Mandate pending the Filing of Petitions for Writ of Certiorari 6

TABLE OF AUTHORITIES – Continued

Page

RBOCs' Petition for Mandamus to Enforce the Mandate of this Court, Nos. 00-1012 *et al.* 8

Statement *FCC Commissioner Martin,* dated June 9, 2004..... 7

Statement of Acting NTIA Administrator Michael D. Gallagher on Solicitor General's Decision not to Appeal D.C. Circuit Decision, dated June 9, 2004 7

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Our original Petition challenged the D.C. Circuit's decision in *United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*)[1] vacating the Federal Communications Commission's ("FCC") delegation to states to make impairment findings relating to landline telecommunications services and upholding the sections of the *Triennial Review Order ("TRO")* (*In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16798 (2003), corrected by *Errata,* 18 F.C.C.R. 19020 (2003)), dealing with line-sharing and hybrid-fiber (Broadband access to the Internet) which, in purporting to implement specific aspects of, 47 U.S.C. §251 and §252 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("1996 Act"), had the actual and practical effect of eviscerating Congress' pro-competitive vision that was embodied in these sections of the 1996 Act. The concern expressed in our Petition for Writ of Certiorari was that the court and agency actions below would have the direct effect of imposing higher prices and fewer choices on both residential and small business customers, with the resulting effect of damaging the economy of California, in particular, and the rest of the nation, in general.

This Reply Brief, in response to filings by Respondents, will demonstrate that competitive choices are dwindling for residential and small business customers in anticipation of the price hikes that will result when the FCC's *TRO* as modified and/or upheld by the court below becomes effective. Because of the pernicious effects that those provisions of the *TRO* that California has complained about (and that

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[1] Pets. *for cert. filed*, Nos. 04-12, 04-15, 04-18 (June 30, 2004). *See also, United States Telecom Ass'n v. FCC*, No. 00-1012 (D.C. Cir. Apr. 13, 2004) (granting a stay of the court's mandate through June 15, 2004) (*USTA II Stay Order*).

the D.C. Circuit has upheld and/or vacated) are already having, it is imperative that this Court act quickly in granting certiorari in the instant case.

This Reply Brief will also correct the record regarding the Solicitor General's inaccurate statement that because no party raised the issue of preemption of state authority to set line-sharing rates before the FCC, the issue cannot be raised on judicial review of the *TRO*.

ARGUMENT

I. SWIFT ACTION ON THE PART OF THIS COURT IS NEEDED TO STOP THE HEMORRHAGING OF THE ONCE COMPETITIVE TELECOMMUNICATIONS MARKETPLACE.

This Court has recognized in its own decisions, *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 371 (1999) ("*AT&T*"); *Verizon Communications v. FCC*, 535 U.S. 467, 488 (2002) ("*Verizon*") and *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko,* 124 S.Ct. 872, ___U.S.___ (2004) ("*Trinko*") that the 1996 Act has as its primary focus the promotion of widespread competition within the telecommunications marketplace. In this Court's most recent case, *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko,* 124 S.Ct. at 875, quoting *Verizon*, 535 U.S. at 488, this Court held that the 1996 Act was intended to "uproot the incumbent LECs' monopoly and to introduce competition in its place." 124 S.Ct. at 875.

Notwithstanding this Court's clear pronouncements on the issue, the Respondents in this case have cynically undermined the purpose of Congress' legislative enactment of only eight years ago, as well as this Court's previous affirmations of Congress' political judgment. Respondents' interpretation of the 1996 Act defies all relevant precedent, the plain language of the 1996 Act and Congress' explicit intent in enacting the 1996 Act. Indeed, if this Court does not overturn the decision of the D.C. Circuit below, the competitive sections of the 1996 Act will have been effectively rendered meaningless, and the

stated goal of the 1996 Act (*i.e.*, "to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies"[2]) as well as the bulk of the pro-competitive sections of that Act, will be relegated to the status of an historical footnote in the history of telecommunications in the modern era.

Since the passage of the 1996 Act only eight years ago, the FCC, the states and this Court as well as other courts have attempted to set forth a rational and legal set of rules designed to permit competitive access to the incumbents' networks at cost-based prices. By 2003, large new competitors to the long-established Regional Bell Operating Companies ("RBOCs"), such as AT&T and MCI, were having success in reaching customers using the unbundled network elements ("UNEs") that allowed access to both traditional telephone services and more innovative broadband services. Residential and small business customers were reaping the benefits of reduced prices from both the RBOCs and their new competitors as a result of this competition.

It has been estimated that residential customers in SBC's territory in California saved between $345 million and $625 million in 2003 alone. See, *UNE-P Benefits Update: SBC's California Territory, 2004,* Yale M. Braunstein, School of Information Management Systems, University of California, Berkeley (May 2004). Other studies have concluded that nationwide, small businesses have saved over $4 billion in 2003 because of this competition. See, *CompTel/Ascent Analysis* (January 28, 2004). However, with the issuance of the *TRO* by the FCC and the D.C. Circuit's decision upholding the broadband provisions of that Order, and vacating other key provisions of the *TRO* relating to landline telephone service, the cost savings cited above are now in grave jeopardy.

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[2] See, Preamble of the 1996 Act.

In their misguided quest to promote a policy agenda that has the practical effect of turning the industry back to the 1980s, an era when the RBOCs held monopolies over residential and business telecommunications services, the FCC's Broadband holdings and D.C. Circuit's significant modifications to the *TRO* puts the economic future of consumers who are dependent on competitive services at risk. Now, in 2004, the FCC and the court below – in direct conflict with Congress' will to promote competition – have decided that their policy judgment to impose an effective monopoly for landline residential and some small business customers as well as a monopoly for Broadband in some areas of California and other states, and a duopoly in other areas, should take precedence over the clear language of the law. However, the language of the 1996 Act does not support this policy judgment, in any event, it is not the place of the D.C. Circuit to substitute its policy determinations for those of Congress. Such actions are simply not consistent with American legal precedent or the American public's perception of the judicial process.

The 1996 Act sought to encourage widespread competition in the telecommunications marketplace. In particular, the 1996 Act encouraged competition – *not* the exercise of de facto monopoly power – in areas where there are new innovative services, such as Broadband and access to Voice over the Internet. (See, 47 U.S.C. §157 (§706(c), *codified in* notes to this section.)) By granting California's Petition in this case, this Court has an opportunity to keep Congress' dream of competition and multiple choices for residential and small business customers alive and viable. This is a time of great turmoil in the telecommunications marketplace, and it is essential that this Court step in and bring order to the chaos.

The urgency which dictates that this Court should review this case is highlighted, for example, by AT&T's recent momentous announcement (*TR Daily,* June 23, 2004) that it is withdrawing from the residential market in many states, and its subsequent declaration that it may cease marketing wireline telephone service to new customers. Other, similar announcements have been made by

other carriers both large and small that are getting out of markets and/or radically cutting back their range of services in anticipation of the upcoming price hikes that will result when the FCC's *TRO* as modified by the court below is fully implemented. (See, *MCI Posts $71 Million Loss, Has Plan For Cash*, Business Section, Washington Post, August 6, 2004). FCC Commissioner Copps has stated in his dissent *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order and Notice of Proposed Rulemaking,* CC Docket No. 01-338 ("*Interim TRO Order*"), that existing customers can expect at least a 15% increase in prices in the near future while new customers can expect increases as high as 300%. See, FCC Commissioner Copps' dissent, *Interim TRO Order*. These price increases will be economically untenable to consumers and carriers that have built their businesses based on the pro-competitive tenets of the 1996 Act.[3]

Such price hikes will have a particularly harmful effect on the customers of small businesses, which generate between two-thirds and three-quarters of all new jobs. Small business is, and necessarily will be, a larger part of the economic recovery anticipated over the next few years. Small businesses produce at least half of the private sector output. In metropolitan areas, a significant number of small business customers have access to innovative broadband services through competitive carriers. These services, in the past, were only available to larger business customers. Such access has clearly had a beneficial effect on improving productivity for these businesses. However, these benefits will soon end for a significant percentage of small businesses that will not be able to afford such

[3] In the area of line-sharing, the Solicitor General justifies the FCC action to eliminate line-sharing by claiming that a carrier can buy a whole loop and another data carrier can then split the data portion of the loop (line-splitting). However, if the major competitors of the RBOCs stop offering service to residential and small business customers, the line-splitting option will never be available to these consumers.

services when they are in the hands of an effective monopoly, which is subject to no significant regulatory oversight. Yet, such a socially unacceptable outcome will be the direct consequence of this Court's failure to overturn the ill-considered Broadband provisions of the *TRO*, and the decision of the D.C. Circuit modifying major parts of the *TRO*, that are at issue here. See, Dissent of Commissioner Copps, *Interim TRO Order*.

It should also be noted that the FCC's decision on June 9, 2004 not to seek review of the *USTA II* Decision occurred only after the Solicitor General sought an extension of time to file the FCC's Petition for Writ of Certiorari from May 31, 2004 to June 30, 2004. Immediately after the *USTA II* decision was issued and up to the time that the Solicitor General decided not to appeal this decision to this Court, a majority of the FCC (the *TRO* had passed on a 3-2 vote) indicated its desire to appeal the *USTA II* Decision. (See, FCC Press Release, *Statement of FCC Commissioners Michael J. Copps, Kevin J. Martin, and Jonathan S. Adelstein on the D.C. Circuit's Decision to Eliminate the FCC's Rule*, March 3, 2004). Moreover, on June 3, 2004 the FCC's General Counsel on behalf of the majority of FCC Commissioners filed at the D.C. Circuit a "Reply to Opposition of the ILEC Petitioners to [the FCC's] Motion to Stay the Mandate pending the Filing of Petitions for Writ of Certiorari" ("Reply"). The FCC begins the Reply by stating the following:

> "In our motion to stay the mandate in this case pending the filing of petitions of certiorari, we demonstrated that this Court's decision presents substantial legal questions meriting further review in light of Supreme Court rulings recognizing the Commission's broad authority to implement the 1996 Act. We also showed that issuance of the mandate will not only place substantial burdens on federal and state regulators, but it will have an immediate and wide-ranging impact on competition in local exchange markets – effects that will prove entirely unnecessary in

> the event the Supreme Court grants review and reverses. . . .
>
> The ILECs do not dispute that the issues at stake have tremendous national significance. If the mandate were to issue, the ILECs would no longer be bound by the Commission's unbundling rules . . . they would be free to argue that they may provide or withhold elements as *they see fit*, and not as the statute or the Commission's rules require." Emphasis added.

Finally, the FCC states in its concluding paragraph of the Reply that the question it planned to raise to this Court was the following:

> "FCC will ask the Supreme Court to resolve . . . whether it was reasonable for the FCC to conclude that mass market switching and dedicated transport must be unbundled and made available as elements pursuant to section 251(c)(3)."

Six days later, in a rather dramatic reversal of this position, FCC Commissioner Kevin Martin, the major force behind the *TRO*, after receiving political input from the current Administration (See, *Statement of Acting NTIA Administrator Michael D. Gallagher on Solicitor General's Decision not to Appeal D.C. Circuit Decision*, dated June 9, 2004) and the Solicitor General's announcement on June 9 that his office would not appeal this decision on behalf of the FCC, changed his mind regarding the FCC pursuing an appeal to this Court (See, Statement *FCC Commissioner Martin*, dated June 9, 2004). Thus, a new majority emerged at the FCC and a decision was made not to appeal those provisions of the *TRO* that the *USTA II* decision had vacated.

As a result of this decision, the FCC issued the *Interim TRO Order* attempting to comply with the D.C. Circuit's *USTA II* decision in the many significant areas where the D.C. Circuit overturned the FCC's *TRO*. This *Interim TRO Order* has the stated purpose of implementing the requirements mandated by the *USTA II* decision in

a legal and somewhat rational process. Notwithstanding this effort by the FCC to set up some form of a reasonable process for moving forward to comply with the D.C. Circuit's order, the RBOCs, anxious to take full advantage of their "victory" in the court below, filed a Mandamus Petition with the D.C. Circuit the day after the *Interim TRO Order* was issued, requesting that it vacate the FCC's *Interim TRO Order* and retain jurisdiction under the assumption that the FCC is incapable of complying with the requirements of the court below.

In their Mandamus Petition, the RBOCs assert that the FCC has essentially granted itself an extension of time to implement what the D.C. Circuit ordered in *USTA II*. The RBOCs demand the FCC produce an impairment finding during the next four months whether or not a record to support such a finding has been developed, and whether or not basic due process procedures have been followed. The RBOCs have threatened to ask the court below to rule that, if the FCC does not produce impairment findings in the next four months, in what essentially would be final rules, it be deemed that there is no impairment with regard to switching, dedicated transport, and enterprise loop. The RBOCs' Mandamus Petition also requests that the *USTA II* decision be made binding on the states. See, RBOCs' Petition for Mandamus to Enforce the Mandate of this Court, Nos. 00-1012 *et al.*

Given that under the original *TRO* rules, California along with 31 other states spent innumerable hours and close to nine months developing records based on which impairment findings could be made under the provision of the *TRO*, the RBOCs are in effect asking the court below to force the FCC to make judgments based on little or no evidence, thereby grossly violating the due process rights of consumers and competitors alike. On September 1, 2004 the D.C. Circuit ordered the FCC to respond within 15 days to the allegations in the RBOCs' Mandamus Petition. See, *USTA v. FCC* (No. 00-1012) (D.C. Cir. 2004).

The RBOCs' efforts plainly are intended to force a regulatory result on the entire American public that serves only the interests of the RBOCs, and that effectively guts any real competition in one of the largest markets (California and the rest of the states) for telecommunication services in the world. The result would be entirely at odds with the express language of Congress in the 1996 Act that specifically seeks *greater* competition for the provision of such services. It is also astonishing that the FCC has effectively knuckled under to political pressures supporting such an unbalanced regulatory result. Finally, it is most egregious of all that one of our nation's highest and most respected courts, in its *USTA II* decision, has shown such little regard both for the clear expression of Congressional intent and for this Supreme Court's own holdings interpreting and applying that intent. See, *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. at 371; *Verizon Communications v. FCC*, 535 U.S. at 488 and *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko,* 124 S.Ct at 875.

It is in this atmosphere of regulatory confusion and blatant disregard for the law of the land by the FCC, the RBOCs and the court below that the State of California and the California Public Utilities Commission implore this Court to take action on this case in an expedited manner.

II. THE SOLICITOR GENERAL INACCURATELY STATES THAT BECAUSE NO PARTY RAISED THE ISSUE OF PREEMPTION OF STATE AUTHORITY TO SET LINE-SHARING RATES BEFORE THE FCC, THE ISSUE CANNOT BE RAISED ON JUDICIAL REVIEW OF THE *TRO*.

The Solicitor General's brief asserts that because no party raised the issue of preemption of State authority to set line sharing rates before the FCC, that issue cannot now be raised on judicial review of the *TRO*. However, the Solicitor General deceptively fails to note that in the

proceeding below, the FCC gave no clear indication that it would adopt a three-year phase-out plan for line-sharing or that it would purport to directly preempt State authority to set line-sharing rates. Consequently, California and other parties had no opportunity to comment to the FCC on the legality of such a plan. Furthermore, under 47 U.S.C. §405, California and other parties are not obligated to file a petition for reconsideration as a condition precedent to seeking judicial review of an FCC order. It should also be noted that, while the Solicitor General may consider this issue to be of little importance, it was of great importance to Congress when it gave States such authority, and remains of great importance to State commissions who represent the hundreds of millions of American consumers in all 50 states. That the D.C. Circuit failed to discuss the issue in the *USTA II* decision suggests a lack of attention by the court to the interests of the average telecommunications user rather than a genuine pronouncement on the legitimacy of the States' legal argument.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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